Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino *and* International Union of Painters and Allied Trades, District Council 16, Local 159, AFL–CIO.[1] Case 28–CA–060841

December 16, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

The issue before us is whether the National Labor Relations Act requires the Respondent to permit employees to use its email and other information-technology (IT) resources for the purpose of engaging in activities protected by Section 7 of the Act. The Respondent indisputably has a property right to restrict employee use of its equipment, including its IT resources.[2] The question presented here is whether that property right must give way where employees seek to use the Respondent's IT resources for Section 7 activity. In deciding this issue, we are guided by the Supreme Court's admonition that "[o]rganization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other."[3]

The Board has long held that with regard to oral solicitation during nonworking time and the distribution of literature during nonworking time in nonworking areas, the Act does limit an employer's property right to control the use of its premises.[4] The Supreme Court approved this "adjustment between the undisputed right of self-organization assured to employees under the" Act and "the equally undisputed right of employers to maintain discipline in their establishments" in its seminal decision in *Republic Aviation Corp. v. NLRB*.[5] But decades of Board precedent establish that the Act generally does not restrict an employer's right to control the use of its equipment.[6] In *Register Guard,* the Board held that this precedent, and the principle for which it stands, applies with equal force to an employer's email system.[7] Subsequently, however, a divided Board in *Purple Communications, Inc.* overruled *Register Guard*, holding for the first time in the history of the Board that employees do have a right to use employer-owned equipment for nonwork purposes.[8] As explained below, the Board's unprecedented decision in *Purple Communications* impermissibly discounted employers' property rights in their IT resources while overstating the importance of those resources to Section 7 activity. Accordingly, we shall overrule *Purple Communications* and return to the standard announced in *Register Guard*. Under that standard, employees have no statutory right to use employer equipment, including IT resources, for Section 7 purposes. However, we shall recognize an exception to the *Register Guard* rule in those rare cases where an employer's email system furnishes the only reasonable means for employees to communicate with one another.

I. BACKGROUND

The Respondent is a Las Vegas casino and hotel, owned and operated by Caesar's Entertainment, Inc. The Respondent's employees all report to and work at the same facility, which contains an employee cafeteria, break rooms, and other nonwork areas where the Respondent permits its employees to engage in nonwork-related solicitation and distribution.

During the period of time covered by the complaint, the Respondent maintained an employee handbook, which it distributes to its workforce of approximately 3000 employees. All employees must sign a form acknowledging receipt of the handbook and their responsibility to comply with its provisions. The handbook advises employees that noncompliance with its provisions may result in discipline, up to and including discharge. As relevant to this decision, the Respondent maintained the following work rules in the portion of its handbook headed "Computer Usage":

> ACCESS, SECURITY AND CONFIDENTIALITY
>
> . . .
>
> Confidentiality:
>
> Do not disclose or distribute outside of [the Respondent] any information that is marked or considered confidential or proprietary unless you have received a

[1] On October 10, 2018, the Charging Party filed a motion to correct the name of the Charging Party. The motion is granted, and the name of the Charging Party has been changed to reflect Local 159's affiliation with District Council 16.

[2] See, e.g., *Union Carbide Corp. v. NLRB*, 714 F.2d 657, 663 (6th Cir. 1983) (employer "*unquestionably* had the right to regulate and restrict employee use of company property") (emphasis in original).

[3] *NLRB v. Babcock & Wilcox*, 351 U.S. 105, 112 (1956).

[4] See, e.g., *Peyton Packing Co.*, 49 NLRB 828, 843 (1943), enfd. 142 F.2d 1009 (5th Cir. 1944) (oral solicitation); *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615, 620 (1962) (distribution of literature).

[5] 324 U.S. 793, 797-798 (1945).

[6] See *Register Guard*, 351 NLRB 1110, 1114-1115 (2007) (citing cases), enfd. in part and remanded sub nom. *Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009).

[7] Id. at 1110.

[8] 361 NLRB 1050 (2014).

> signed non-disclosure agreement through the Law Department.
>
> . . . .
>
> General Restrictions:
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> Computer resources may not be used to:
>
> . . .
>
> • Share confidential information with the general public, including discussing the company, its financial results or prospects, or the performance or value of company stock by using an internet message board to post any message, in whole or in part, or by engaging in an internet or online chatroom
>
> • Convey or display anything fraudulent, pornographic, abusive, profane, offensive, libelous or slanderous
>
> • Send chain letters or other forms of non-business information
>
> . . .
>
> • Solicit for personal gain or advancement of personal views
>
> • Violate rules or policies of the Company
>
> Do not visit inappropriate (non-business) websites, including but not limited to online auctions, day trading, retail/wholesale, chat rooms, message boards and journals. Limit the use of personal email, including using streaming media (e.g., video and audio clips) and downloading photos.

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by maintaining the above-quoted handbook rules, hereafter the "computer rules," as well as eight other rules that do not restrict the use of IT resources, hereafter the "non-computer rules." In 2015, the Board—reviewing a 2012 decision by Administrative Law Judge William L. Schmidt—found that four of the challenged non-computer rules were unlawful and four were lawful.[9] The Board also remanded the computer rules for further consideration in light of *Purple Communications,* which issued after Judge Schmidt's decision, in which he found the computer rules lawful under *Register Guard.*[10]

On May 3, 2016, Administrative Law Judge Mara-Louise Anzalone issued the attached decision. Applying *Purple Communications*, she found that the Respondent's rule against "[s]end[ing] chain letters or other forms of non-business information" was presumptively unlawful. Judge Anzalone also found that the Respondent failed to establish that its obligation to protect confidential guest information constituted special circumstances justifying this rule. Accordingly, Judge Anzalone concluded that the Respondent violated Section 8(a)(1) of the Act by maintaining a prohibition on "[s]end[ing] . . . non-business information." Judge Anzalone concluded that the Board's remand did not require her to reassess Judge Schmidt's decision with respect to the Respondent's other computer rules.

The Respondent filed exceptions and a supporting brief, and the Charging Party filed cross-exceptions and a supporting brief. The General Counsel filed an answering brief to the Respondent's exceptions, and the Respondent filed an answering brief to the Charging Party's cross-exceptions. The Charging Party and the Respondent both filed reply briefs.

On August 1, 2018, the Board issued a Notice and Invitation to File Briefs in this matter, asking the parties and interested amici to address the following questions:

> 1. Should the Board adhere to, modify, or overrule *Purple Communications*?
>
> 2. If you believe the Board should overrule *Purple Communications*, what standard should the Board adopt in its stead? Should the Board return to the holding of *Register Guard* or adopt some other standard?
>
> 3. If the Board were to return to the holding of *Register Guard*, should it carve out exceptions for circumstances that limit employees' ability to communicate with each other through means other than their employer's email system (e.g., a scattered workforce, facilities located in areas that lack broadband access)? If so, should the Board specify such circumstances in advance or leave them to be determined on a case-by-case basis?
>
> 4. The policy at issue in this case applies to employees' use of the Respondent's "[c]omputer resources." Until now, the Board has limited its holdings to employer email systems. Should the Board apply a different standard to the use of computer resources other than email? If so, what should that standard be? Or should it apply whatever standard the Board adopts for the use of employer email systems to other types of electronic communications (e.g., instant messages, texts, postings on social media) when made by employees using employer-owned equipment?

[9] *Rio All-Suites Hotel & Casino*, 362 NLRB 1690 (2015), overruled in part by *Boeing Co.*, 365 NLRB No. 154, slip op. at 19 fn. 89 (2017), reconsideration denied 366 NLRB No. 128 (2018). We address the noncomputer rules in Sec. II.F.2, below.

[10] Id.

The General Counsel, the Charging Party, and the Respondent filed briefs. The Respondent filed a brief in response to the Charging Party's and amici's briefs, and the Charging Party filed a brief in response to the Respondent's and amici's briefs. Amicus/amici briefs were filed by American Federation of Labor and Congress of Industrial Organizations; American Hospital Association and Federation of American Hospitals, jointly; Arkansas State Chamber of Commerce and Associated Builders and Contractors of Arkansas, jointly; Center for Workplace Compliance; Coalition for a Democratic Workplace, Retail Industry Leaders Association, Chamber of Commerce of the United States of America, Independent Electrical Contractors, Inc., International Foodservice Distributors, National Association of Wholesaler-Distributors, National Retail Federation, Restaurant Law Center, American Hotel and Lodging Association, and Associated Builders and Contractors, jointly; Council on Labor Law Equality; Professor Jeffrey M. Hirsch; HR Policy Association, National Association of Manufacturers, National Federation of Independent Business Small Business Legal Center, and Society for Human Resource Management, jointly; Illinois State Chamber of Commerce; International Brotherhood of Electrical Workers, Local Union 304; Senator Patty Murray; National Nurses United; Nevada Resort Association; Screen Actors Guild-American Federation of Television and Radio Artists; Service Employees International Union and National Employment Law Project, jointly; Montgomery Blair Sibley; United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO; and United States Postal Service.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[11] and conclusions only to the extent consistent with this Decision and Order.[12]

II. DISCUSSION

A. Positions of the Parties and Amici

[11] The Respondent has excepted to some of Judge Anzalone's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We decline to consider the Charging Party's argument in its cross-exceptions brief that the Respondent has violated the Act by maintaining a provision in its employee handbook prohibiting the use of its computer resources to violate state law. The complaint does not include this allegation, and a charging party cannot enlarge upon or change the General Counsel's theory of the case. See, e.g., *Kimtruss Corp.*, 305 NLRB 710, 711 (1991).

On September 27, 2018, the Charging Party filed a motion requesting that Member Emanuel recuse himself from participating in this case because of his former affiliation with the law firm of Littler Mendelson. The Charging Party also moved the Board to rescind the Notice and Invitation to File Briefs based on Member Emanuel's participation in the issuance of that Notice. In consultation with the Board's Designated Agency Ethics Official (DAEO), Member Emanuel has determined not to recuse himself. Under paragraph 6 of the Trump Ethics Pledge, which Member Emanuel has signed as required by Executive Order 13770, Member Emanuel may not participate for the first 2 years of his term in cases in which his former firm, Littler Mendelson, represents a party, or in which one of his former clients is or represents a party. The Respondent is not Member Emanuel's former client, and Littler Mendelson does not represent any party to this case. In addition, no person with whom Member Emanuel has a covered relationship within the meaning of 5 C.F.R. § 2635.502 is or represents a party to this case, nor does Member Emanuel believe that his participation would "cause a reasonable person with knowledge of the relevant facts to question his impartiality." Id. Accordingly, the motion to rescind the Notice and Invitation to File Briefs is denied.

On October 24, 2018, the Charging Party filed a request that the Board take administrative notice of briefs filed by the General Counsel in the Ninth Circuit in *Communications Workers of America v. NLRB* (Nos. 17-70948, 17-71062, and 17-71276) and *Parrish v. NLRB* (Nos. 17-70648, 17-71493, and 17-71570), and on January 9, 2019, the Respondent filed a request that the Board take administrative notice of the Respondent's filings with the Ninth Circuit in the proceeding to enforce the Board's order as to the non-computer rules (No. 17-71353). We deny these requests because appellate filings have no precedential value or dispositive effect in Board proceedings.

On January 17, 2019, the Charging Party filed a request that the Board take administrative notice of the administrative law judge's decision in *Purple Communications, Inc.*, Cases 21–CA–149635 et al. On April 19, 2019, the Charging Party filed requests that the Board take administrative notice of the Board's decisions in *Cayuga Medical Center at Ithaca, Inc.*, 367 NLRB No. 21 (2018), *Bodega Latina Corporation d/b/a El Super*, 367 NLRB No. 34 (2018), *Chicago Teachers Union*, 367 NLRB No. 50 (2018), and *Quicken Loans, Inc.*, 367 NLRB No. 112 (2019). On June 5, 2019, the Charging Party filed a request that the Board take administrative notice of the Board's decision in *Quality Dining, Inc.*, 367 NLRB No. 143 (2019). On August 27, 2019, the Charging Party filed a request that the Board take administrative notice of the Board's decision in *Bexar County Performing Arts Center Foundation d/b/a Tobin Center for the Performing Arts,* 368 NLRB No. 46 (2019). And on October 3, 2019, the Charging Party filed a request that the Board take administrative notice of the Board's decision in *T-Mobile USA, Inc.*, 368 NLRB No. 81 (2019). The Board may take administrative notice of its own proceedings, *Farmer Bros. Co.*, 303 NLRB 638, 638 fn. 1 (1991), enfd. mem. 988 F.2d 120 (9th Cir. 1993), and accordingly we grant the Charging Party's requests. However, consideration of those decisions does not affect our decision in this case. See *Independent Stave Co.,* 278 NLRB 593, 593 fn. 1 (1986).

Also on June 5, 2019, the Charging Party filed a request that the Board take administrative notice of the decision of the California Public Employment Relations Board in *Moberg v. Napa Valley Community College District*, 42 Pub. Employee Rep. for California ¶ 154 (2018) (adopting *Purple Communications*). We find it unnecessary to do so because the decision would not affect our disposition of this case.

[12] The Charging Party and one of the amici have requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties and amici.

The Charging Party and certain amici contend that the Board should adhere to the holding of *Purple Communications*.[13] They argue that *Purple Communications* strikes an appropriate balance between employee rights and management interests. They also emphasize the centrality of email in modern office life and that the falling costs of data storage mean that any costs employers will have to bear as a result of employees' use of employers' IT resources for Section 7 communications will be negligible. They also emphasize that most employers permit at least some personal communications over employer-provided email systems without experiencing negative effects on either productivity or those systems.[14]

The Respondent, the General Counsel, and certain amici argue that the Board should overrule *Purple Communications* and reinstate the holding of *Register Guard*.[15] They argue that the *Purple Communications* Board attached too little weight to employer property interests in their email systems. They also stress that enforcing restrictions on the sending, and particularly the reading, of non-work email during working time, while permissible under *Purple Communications,* is unworkable in practice. Additionally, the Respondent, the General Counsel, and several amici argue that the rule of *Purple Communications* violates the First Amendment by requiring employers to subsidize hostile speech.

Among the parties and amici that address the issues, nearly all argue that the Board should carve out exceptions to the holding of *Register Guard* on a case-by-case basis and that the holding of that case, reinstated here, should apply to all employer-owned IT resources, not only to employer email systems.

B. The Board's decision in Register Guard

As noted above, the Board first considered whether employees have a Section 7 right to use employer-provided email for Section 7 communications in *Register Guard*.[16] The Board there determined that employees do not have such a right, relying on a long line of Board decisions holding that there is no statutory right to use employer-provided equipment.[17]

In *Register Guard*, the Board rejected the argument that rules governing employees' use of workplace email should be analyzed under the balancing test articulated in *Republic Aviation Corp. v. NLRB*.[18] The Board explained that *Republic Aviation* safeguards employees' right to face-to-face solicitation and distribution in the workplace, but it "does not require the most convenient or most effective means of conducting those communications, nor does it hold that employees have a statutory right to use an employer's equipment or devices for Section 7 communications."[19] Having clarified that *Republic Aviation*'s holding is limited to communications "that involve only the employees' own conduct during nonwork time and do not involve use of the employer's equipment," the Board concluded that the outcome of the case should be determined by "applying the settled principle that, absent discrimination, employees have no statutory right to use an employer's equipment or media for Section 7 communications."[20] The Board also observed that there was no contention that the employer's employees rarely or never saw each other in person or that they communicated with each other solely by electronic means, and the Board did not pass on "circum-

[13] Amici who favor adhering to the holding of *Purple Communications* are American Federation of Labor and Congress of Industrial Organizations; Professor Jeffrey M. Hirsch; International Brotherhood of Electrical Workers, Local Union 304; Senator Patty Murray; National Nurses United; Screen Actors Guild-American Federation of Television and Radio Artists; Service Employees International Union and National Employment Law Project, jointly; Montgomery Blair Sibley; and United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO.

[14] The Charging Party and two amici additionally argue that *Purple Communications* should be extended to give employees a presumptive right to email for Sec. 7 purposes during working time.

[15] These amici are American Hospital Association and Federation of American Hospitals, jointly; Arkansas State Chamber of Commerce and Associated Builders and Contractors of Arkansas, jointly; Center for Workplace Compliance; Coalition for a Democratic Workplace, Retail Industry Leaders Association, Chamber of Commerce of the United States of America, Independent Electrical Contractors, Inc., International Foodservice Distributors, National Association of Wholesaler-Distributors, National Retail Federation, Restaurant Law Center, American Hotel and Lodging Association, and Associated Builders and Contractors, jointly; Council on Labor Law Equality; HR Policy Association, National Association of Manufacturers, National Federation of Independent Business Small Business Legal Center, and Society for Human Resource Management, jointly; Illinois State Chamber of Commerce; and United States Postal Service.

[16] 351 NLRB at 1110.

[17] Id. at 1114 (citing *Mid-Mountain Foods*, 332 NLRB 229, 230 (2000) (no statutory right to use the television in the respondent's breakroom to show a pro-union campaign video), enfd. 269 F.3d 1075 (D.C. Cir. 2001); *Eaton Technologies*, 322 NLRB 848, 853 (1997) ("It is well established that there is no statutory right of employees or a union to use an employer's bulletin board."); *Champion International Corp.*, 303 NLRB 102, 109 (1991) (stating that an employer has "a basic right to regulate and restrict employee use of company property," such as a copy machine); *Churchill's Supermarkets*, 285 NLRB 138, 155 (1987) ("[A]n employer ha[s] every right to restrict the use of company telephones to business-related conversations . . . ."), enfd. 857 F.2d 1474 (6th Cir. 1988); *Union Carbide Corp.*, 259 NLRB 974, 980 (1981) (employer "could unquestionably bar its telephones to any personal use by employees"), enfd. in relevant part 714 F.2d 657 (6th Cir. 1983); *Heath Co.*, 196 NLRB 134 (1972) (employer did not engage in objectionable conduct by refusing to allow pro-union employees to use public address system to respond to anti-union broadcasts)).

[18] 324 U.S. at 793.

[19] *Register Guard*, 351 NLRB at 1115.

[20] Id. at 1115–1116.

stances, not present here, in which there are no means of communication among employees at work other than e-mail."[21]

C. The Board's Decision in Purple Communications

In 2014, a Board majority, over the dissents of then-Members Miscimarra and Johnson, overruled *Register Guard* in *Purple Communications.* The *Purple Communications* Board did not contend that its decision was necessitated by technological changes or that the rule announced in *Register Guard* had proven unworkable or given rise to unintended consequences. Rather, the majority in *Purple Communications* believed that *Register Guard* "undervalued" employees' Section 7 rights and "failed to perceive the importance of email as a means" of employee communication.[22] Rather than being equipment,[23] the *Purple Communications* Board held that email was a "natural gathering place," akin to a break-room or employee cafeteria, the use of which was governed by the *Republic Aviation* framework.[24] Based on these premises, the *Purple Communications* Board held that if an employer provides an employee with access to its email system, it cannot prohibit the employee from using the system for Section 7–protected communications on nonworking time absent a showing by the employer of special circumstances.[25] The Board stated that such circumstances would be "rare,"[26] and in the years since *Purple Communications* was decided, the Board has never found special circumstances justifying a prohibition on nonwork-related email.

Conversely, the *Purple Communications* dissenters took the position that requiring employers to open their email systems to nonwork-related communications "demonstrate[d] an unreasonable indifference to employer property rights."[27] The dissenters emphasized that the Supreme Court had admonished that

> the Act "does not command that labor organizations as a matter of abstract law, under all circumstances, be protected in the use of every possible means of reaching the minds of individual workers, nor that they are entitled to use a medium of communication simply because the employer is using it."[28]

They explained that the *Republic Aviation* framework was limited to the analysis of restrictions on face-to-face communications,[29] and they warned that although the right identified by the majority was purportedly limited to nonworking time, in practice that limitation would be impossible to enforce.[30] The dissenters concluded that because employees had no need to utilize employer-provided email in order to exercise their Section 7 rights, there was no basis for finding that employers interfered with, restrained, or coerced employees in the exercise of those rights by limiting business email to business-related purposes.[31]

D. Purple Communications is Overruled

We believe the *Register Guard* Board and the *Purple Communications* dissenters were correct when they concluded that there is no statutory right for employees to use employer-provided email for nonwork, Section 7 purposes in the typical workplace. As we shall explain, only that view faithfully hews to the Supreme Court's admonition that "[a]ccommodation between [employees' organizational rights and employers' property rights] must be obtained with as little destruction of one as is consistent with the maintenance of the other."[32]

As the Board observed in *Register Guard*, an employer's communication systems, including its email system, are its property.[33] Accordingly, employers have a property right to control the use of those systems.[34] This

[21] Id. at 1116.

[22] *Purple Communications*, 361 NLRB at 1053.

[23] Although purporting to differentiate email systems from other employer-owned equipment based on their capacity and insignificant marginal costs per message, the *Purple Communications* Board questioned the force of Board decisions permitting employers to restrict the use of other forms of employer-owned equipment. Id. at 1058-1059. Nevertheless, the Board did not overrule the employer-equipment precedent cited above in fn. 17.

[24] Id. at 1057.

[25] Id. at 1063.

[26] Id.

[27] Id. at 1072 (Member Miscimarra, dissenting); accord id. at 1083 (Member Johnson, dissenting).

[28] Id. at 1071 (Member Miscimarra, dissenting) (quoting *NLRB v. Steelworkers of America (NuTone, Inc.)*, 357 U.S. 357, 364 (1958) (*NuTone I*)); id. at 1084 (Member Johnson, dissenting).

[29] Id. at 1069-1070 (Member Miscimarra, dissenting); id. at 1086 (Member Johnson, dissenting).

[30] Id. at 1074 (Member Miscimarra, dissenting); id. at 1080 (Member Johnson, dissenting).

[31] Id. at 1077 (Member Miscimarra, dissenting); id. at 1110 (Member Johnson, dissenting).

[32] *NLRB v. Babcock & Wilcox Co.*, 351 U.S. at 112. Moreover, although we believe the rule of *Purple Communications* is foreclosed by Supreme Court precedent, even if we were to assume that the Court's precedent *permits* the rule in *Register Guard* as opposed to *requiring* it, we would nevertheless return to the *Register Guard* standard. As stated above, our Court-mandated task is to strike the appropriate balance between employers' right to control their property and employees' Sec. 7 rights. By prohibiting employers from adopting restrictions on employer IT systems absent special circumstances—in effect, preventing employers from adopting prophylactic rules to protect productivity and the integrity of IT systems—the *Purple Communications* Board disregarded employer property rights almost entirely. The approach we adopt today, permitting employers to regulate the use of their equipment but creating an exception where the use of IT systems is reasonably necessary to vindicate employees' Sec. 7 rights, strikes a more appropriate balance.

[33] 351 NLRB at 1114.

[34] *Union Carbide Corp. v. NLRB*, supra, 714 F.2d at 663–664.

principle was not disputed by the *Purple Communications* majority, and we regard it as indisputable.[35]

Consistent with that principle, we reaffirm the long line of Board decisions holding that there is no Section 7 right to use employer-owned televisions,[36] bulletin boards,[37] copy machines,[38] telephones,[39] or public-address systems.[40] Although not necessarily articulated in those decisions, their holdings nevertheless follow from the Supreme Court's recognition, in *NLRB v. Steelworkers (NuTone)*,[41] that the Act

> does not command that labor organizations as a matter of abstract law, under all circumstances, be protected in the use of every possible means of reaching the minds of individual workers, nor that they are entitled to use a medium of communication simply because the employer is using it.[42]

Contrary to the *Purple Communications* majority, the Supreme Court's decision in *Republic Aviation* does not require a different result, either for employer equipment generally or for employer email systems in particular. In *Republic Aviation*, the Court considered a series of Board decisions where employers had banned all union solicitation or the distribution of union literature on their premises. As those decisions carefully explained,

> employees cannot realize the benefits of the right to self-organization guaranteed them by the Act, unless there are adequate avenues of communication open to them whereby they may be informed or advised as to the precise nature of their rights under the Act and of the advantages of self-organization, and may have opportunities for the interchange of ideas necessary to the exercise of their right to self-organization.[43]

A complete prohibition on solicitation and literature distribution in the workplace would necessarily choke off those "avenues of communication" at "the very time and place uniquely appropriate and almost solely available to them therefor."[44] Accordingly, the Board has held that restrictions on oral solicitation during nonworking time are presumptively unlawful.[45] As the Board subsequently explained,

> unless the right of employees to engage in effective oral solicitation is to be virtually nullified, a limitation upon the employer's normal and legitimate property rights is required. The scope of that limitation, however, is to be determined by the nature of the need. Balancing the respective rights, the working time versus nonworking time adjustment has been evolved. The respective rights of both employer and employees are thus accorded their proper weight.[46]

Importantly, the Board did not hold that all restrictions on Section 7 activity in the workplace were unlawful. To the contrary, the Board has explicitly recognized that

> [t]he Act . . . does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. Such a rule must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose.[47]

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[35] The *Purple Communications* majority did contend that an employer's property right in its equipment was weaker than its property rights in its realty because under the common law, liability for a trespass to land requires no showing of actual harm, whereas liability for a trespass to personal property requires a showing of actual harm. 361 NLRB at 1059–1060. We are unpersuaded by this analysis for the reasons stated in Sec. II.F, below. In any event, we find, for the reasons that follow, that in the typical workplace, employees have adequate avenues for engaging in Sec. 7 activity without infringing on their employer's property rights in their equipment, and therefore requiring those property rights to yield to the exercise of Sec. 7 rights is unnecessary and unjustified.

[36] *Mid-Mountain Foods*, 332 NLRB at 229.

[37] *Eaton Technologies*, 322 NLRB at 848; *Nugent Service*, 207 NLRB 158, 161 (1973).

[38] *Champion International Corp.*, 303 NLRB at 102.

[39] *Churchill's Supermarkets*, 285 NLRB at 138.

[40] *Heath Co.*, 196 NLRB at 134.

[41] *NuTone I*, 357 U.S. at 357, affirming *NLRB v. Avondale Mills*, 242 F.2d 669 (5th Cir. 1957), and affirming in part and reversing in part *Steelworkers (NuTone) v. NLRB*, 243 F.2d 593 (D.C. Cir. 1956) (*NuTone II*).

[42] *NuTone I*, supra at 364.

The *Purple Communications* Board suggested that *NuTone I* concerned the rights of labor organizations. 361 NLRB at 1063 fn. 71. But the cases before the Court involved the enforcement of no-solicitation rules against employees. See *NuTone I*, 357 U.S. at 362 ("The very narrow and almost abstract question here [is] . . . when the employer himself engages in anti-union solicitation that if engaged in by employees would constitute a violation of the rule . . . , [is] his enforcement of an otherwise valid no-solicitation rule against *the employees* . . . itself an unfair labor practice.") (emphasis added); see also *Avondale Mills*, 242 F.2d at 670 ("The Trial Examiner . . . concluded that the company did not violate Sections 8(a)(1) and (3) of the Act when it discharged *employees* . . . for violating th[e no-solicitation] rule.") (emphasis added); *NuTone II*, 243 F.2d at 596 ("The issue before us . . . is: Whether an employer commits an unfair labor practice if . . . it enforces an otherwise valid rule against *employee* distribution of union literature . . . .") (emphasis added). Further, the Court of Appeals for the Seventh Circuit relied on *NuTone I* in holding that absent discrimination, employees have no right to post notices of union meetings on employer bulletin boards. *Guardian Industries Corp. v. NLRB*, 49 F.3d 317, 318 (7th Cir. 1995).

[43] *LeTourneau Co. of Georgia*, 54 NLRB 1253, 1260 (1944), upheld in *Republic Aviation*, supra.

[44] *Republic Aviation*, 324 U.S. at 801 fn. 6 (internal quotation omitted).

[45] *Peyton Packing Co.*, 49 NLRB at 843.

[46] *Stoddard-Quirk*, 138 NLRB at 620.

[47] *Peyton Packing Co.*, 49 NLRB at 843.

Similarly, the Board has held that restrictions on the distribution of literature during working time and in working areas are also presumptively lawful, after carefully balancing the interests of employers and employees implicated by that organizational technique.[48] Thus, only rules that restrict solicitation during nonworking time or the distribution of literature on nonworking time and in nonworking areas are presumptively unlawful, and even then the rules may be justified if "special circumstances" are shown.[49]

The *Republic Aviation* Court held that these balanced presumptions, carefully developed by the Board based on its experience in the administration of the Act, represented a proper "adjustment between the undisputed right of self-organization assured to employees under the" Act and

> the equally undisputed right of employers to maintain discipline in their establishments. Like so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee. Opportunity to organize and proper discipline are both essential elements in a balanced society.[50]

The *Purple Communications* majority nevertheless seized on *Republic Aviation* as the basis for its conclusion that employees have a statutory right to use their employer's email system for Section 7 activity. As explained below, the majority's analysis in *Purple Communications* is fundamentally flawed.

Initially, we note that *Republic Aviation* dealt exclusively with face-to-face Section 7 activity within a physical workplace,[51] where the line separating working and nonworking areas is generally clear, and where solicitation takes place synchronously and it is easily determined whether all employees engaged therein are on working or nonworking time. The teaching of that decision regarding the times when and places where employers may restrict Section 7 activity has little relevance to an employer's email system, which creates a virtual space in which the distinction between working and nonworking areas is meaningless, and in which solicitation may and often would take place asynchronously—i.e., where Section 7–related communications may be composed, sent, and read at different times. We need not reach the issue of whether, as numerous amici contend, employers have no practical means of restricting nonwork emails to nonworking time under *Purple Communications.* We simply observe that *Republic Aviation* was premised on the principle that "working time is for work" and involved circumstances in which the line separating working from nonworking time could be clearly perceived and understood by employers and employees alike, which is not the case with emails.

More fundamentally, *Republic Aviation* does not support the proposition, embraced by a Board majority in *Purple Communications,* that if an employer grants employees access to its email system, it must allow them to use it for Section 7 activity absent special circumstances. To the contrary, even with respect to on-premises solicitation and literature distribution, any limitation imposed by the Act on "the employer's normal and legitimate property rights . . . is to be determined by the nature of the need."[52] Moreover, "[w]here there is no necessary conflict neither right should be abridged. By the same [token], where conflict does exist, the abridgement of either right should be kept to a minimum."[53] It necessarily follows that the scope of any limitation on employer property rights in equipment must likewise "be determined by the nature of the need" and, where necessary to accommodate Section 7 rights, "kept to a minimum."[54]

Properly understood, then, *Republic Aviation* stands for the twin propositions that employees must have "*adequate* avenues of communication"[55] in order to meaningfully exercise their Section 7 rights and that employer property rights must yield to employees' Section 7 rights when necessary to avoid creating an "*unreasonable* impediment to the exercise of the right to self-organization."[56] In the typical workplace, however, oral solicitation and face-to-face literature distribution provide more than "adequate avenues of communication." Indeed, the Board has long recognized that the "free time

[48] *Stoddard-Quirk*, 138 NLRB at 620-621.

[49] Id. (literature distribution); see also *Peyton Packing Co.*, supra (solicitation).

[50] 324 U.S. at 797-798.

[51] Id. at 801 fn. 6 (quoting *Republic Aviation*, 51 NLRB 1186, 1195 (1943), enfd. 142 F.2d 193 (2d Cir. 1944), affd. 324 U.S. 793) (internal quotation marks omitted); accord *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 491 (1978) ("[T]he right of employees to self-organize and bargain collectively established by § 7 of the NLRA . . . necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite.") (internal citation omitted).

[52] *Stoddard-Quirk*, 138 NLRB at 620.

[53] Id. at 617.

[54] Id.

[55] *Le Tourneau Co. of Georgia*, 54 NLRB at 1260 (emphasis added).

[56] *Republic Aviation*, 324 U.S. at 802 fn. 8 (emphasis added; internal quotation marks and citations omitted). We disagree with *Register Guard* to the extent it suggested that *Republic Aviation* can never apply to employer equipment. As discussed below, we recognize that the principles of *Republic Aviation* would require employers to permit access to their IT systems for Sec. 7 purposes in those atypical and rare situations in which employees otherwise would be deprived of "adequate avenues for communication" necessary for the exercise of their Sec. 7 rights.

of employees on plant property [is] the very time and place uniquely appropriate for" oral solicitation.[57] Likewise, the distribution of literature, in nonworking areas on nonworking time, is also an effective method of communication.[58] There is no reason to believe that these methods of communication have ceased to be available in the typical workplace, and almost all employees continue to report to such workplaces on a regular basis.[59] Moreover, in modern workplaces employees also have access to smartphones,[60] personal email accounts,[61] and social media,[62] which provide additional avenues of communication, including for Section 7–related purposes.[63] Accordingly, there is no basis for concluding that a prohibition on the use of an employer's email system for nonwork purposes in the typical workplace creates an "*unreasonable* impediment to the exercise of the right to self-organization."[64]

Significantly, the *Purple Communications* Board did not contend that opportunities for face-to-face communication in the typical workplace were no longer adequate to permit employees to exercise their Section 7 rights. Rather, the Board argued that an employer's email system was a useful, convenient, and effective additional means for employees to engage in Section 7 discussions with their coworkers. But the Act "does not require the most convenient or most effective means of conducting those communications."[65] Moreover, to hold that mere convenience is sufficient to negate employers' right to regulate the use of their IT systems would be to ignore the Supreme Court's directive to resolve the tension between employees' Section 7 rights and employers' property rights "with as little destruction of one as is consistent with the maintenance of the other."[66]

We recognize that there may be some cases in which an employer's email system furnishes the only reasonable means for employees to communicate with one another. Consistent with the principles stated above, an employer's property rights may be required to yield in such circumstances to ensure that employees have adequate avenues of communication. Because, in the typical workplace, employees do have adequate avenues of communication that do not infringe on employer property rights in employer-provided equipment, we expect such cases to be rare. We shall not here attempt to define the scope of this exception but shall leave it to be fleshed out on a case-by-case basis.[67]

Accordingly, for the foregoing reasons, as well as—to the extent consistent with this decision—those articulated in *Register Guard* and by Members Miscimarra and Johnson in their *Purple Communications* dissents, we have determined that *Purple Communications* must be overruled. We hold instead that an employer does not violate the Act by restricting the nonbusiness use of its IT resources absent proof that employees would otherwise be deprived of any reasonable means of communicating with each other, or proof of discrimination.[68]

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[57] *Stoddard-Quirk*, 138 NLRB at 620 (internal quotation omitted).

[58] See id. at 620-621; *Le Tourneau Co. of Georgia*, 54 NLRB at 1260-1261.

[59] See *Latest Telecommuting/Mobile Work/Remote Work Statistics*, Global Workplace Analytics, https://globalworkplaceanalytics.com/telecommuting-statistics (last visited Sept. 6, 2019) (only 3.4 percent of the workforce works from home at least half the time). The Respondent's facility is a case in point: as noted above, the Respondent's employees report to a single facility, and that facility contains employee break rooms and cafeterias where employees may engage in solicitation and distribution for Sec. 7 purposes.

[60] According to a recent Pew Research Center survey, approximately 81% of U.S. adults own a smartphone. *Mobile Fact Sheet*, Pew Research Center: Internet & Technology (June 12, 2019), https://www.pewinternet.org/fact-sheet/mobile/.

[61] As early as 2007, nearly 90% of American adults had a personal email account. Deborah Fallows, *Spam 2007*, Pew Internet & American Life Project (May 23, 2007), https://www.pewinternet.org/2007/05/23/spam-2007/.

[62] Approximately 72% of U.S. adults use some form of social media. *Social Media Fact Sheet*, Pew Research Center: Internet & Technology (June 12, 2019), https://www.pewinternet.org/fact-sheet/social-media/. Moreover, the demographic group least likely to own a smartphone or use social media is adults over the age of 65, so these statistics almost certainly understate the prevalence of smartphones and social media usage among working-age adults.

[63] For examples of employees using personal electronic devices and/or social media to engage in Sec. 7 communications, see, e.g., *North West Rural Electric Cooperative*, 366 NLRB No. 132 (2018) (protected Facebook post concerning workplace safety); *EF International Language School, Inc.*, 363 NLRB No. 20 (2015) (protected discussions over personal email accounts), enfd. 673 Fed. Appx. 1 (D.C. Cir. 2017); *Bettie Page Clothing*, 361 NLRB 876 (2014) (protected Facebook messages expressing concern about working late in unsafe neighborhood), remanded 688 Fed. Appx. 3 (D.C. Cir. 2017); *Triple Play Sports Bar and Grille*, 361 NLRB 308 (2014) (protected concerted use of Facebook to complain about income-tax withholding), affd. sub nom. *Three D, LLC v. NLRB*, 629 Fed. Appx. 33 (2d Cir. 2015); *Laurus Technical Institute*, 360 NLRB 1155 (2014) (protected text messages regarding employer favoritism in assigning leads); *Salon/Spa at Boro, Inc.*, 356 NLRB 444 (2010) (employees exchanged protected text messages concerning plan to complain to management about conduct of supervisors).

[64] *Republic Aviation*, 324 U.S. at 802 fn. 8 (emphasis added).

[65] *Register Guard*, 351 NLRB at 1115; see also *Guardian Industries Corp. v. NLRB*, 49 F.3d at 318 ("Section 7 of the Act protects organizational rights . . . rather than particular means by which employees may seek to communicate."); *Nutone I*, 357 U.S. at 363-364.

[66] *Babcock & Wilcox*, 351 U.S. at 112.

[67] We shall likewise leave for a future appropriate case whether this exception would apply to IT resources other than email.

[68] In *Register Guard,* the Board adopted a modified standard for determining whether discriminatory enforcement has been established. 351 NLRB at 1116–1119. Because there is no contention that the Respondent discriminatorily applied its policy in this case, we do not

E. Retroactive Application of the New Standard

When the Board announces a new standard, a threshold question is whether the new standard may appropriately be applied retroactively, or whether it should be applied only in future cases. In this regard, "[t]he Board's usual practice is to apply new policies and standards retroactively 'to all pending cases in whatever stage.'"[69] Only when it would create a "manifest injustice" does the Board decide not to apply a new rule retroactively.[70] The Supreme Court has indicated that the propriety of retroactive application is determined by balancing any ill effects of retroactivity against "the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles."[71]

We do not envision that any ill effects will result from retroactively applying the standard we announce here in cases where the issue presented is whether the employer unlawfully maintained certain rules. As discussed above, *Purple Communications* represented a sharp departure from decades of precedent holding that an employer has the right to impose nondiscriminatory restrictions on the use of its equipment. There is no suggestion that any party relied on *Purple Communications* with respect to any of the actions at issue in this case, and no rule that was lawful under *Purple Communications* will be found unlawful as a result of the retroactive application of our decision.

On the other hand, because the Board's standard in *Purple Communications* failed to properly accommodate Section 7 rights and private property rights, failing to apply our new standard retroactively would "produc[e] a result which is contrary to a statutory design or to legal and equitable principles."[72] Such a result would be produced if the Board were to require an employer that violated the now-overruled *Purple Communications* standard to post a notice stating that it will cease and desist from maintaining rules against the use of its email system for nonwork purposes, when it had no obligation to permit such use in the first place. Moreover, the *Purple Communications* standard was in effect for less than four years before the Board solicited briefs on whether it should be overruled, and it has never been approved by a court of appeals. Accordingly, we find no "manifest injustice" in applying the standard we announce today to this case and all pending cases that similarly involve allegations that an employer unlawfully maintained rules restricting the use of the employer's IT resources for nonwork purposes.

address here the impact, if any, on that standard of our recent decision in *Kroger Ltd. Partnership I Mid-Atlantic*, 368 NLRB No. 64 (2019).

[69] *SNE Enterprises*, 344 NLRB 673, 673 (2005) (quoting *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006–1007 (1958)).

[70] Id.

[71] Id. (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947)).

[72] *Chenery Corp.*, 332 U.S. at 203.

F. Response to the Dissent

Our dissenting colleague offers a number of arguments in favor of retaining *Purple Communications*. She argues that our holding elides the distinction between employees and third parties and improperly considers alternative means of communication in striking the balance between employers' property rights and employees' Section 7 rights. She claims that the Board's equipment cases do not support the rule that we adopt today. And the dissent believes that we improperly balance the rights at issue. We have considered our colleague's arguments, and we find them unpersuasive.

Preliminarily, the dissent contends that we improperly rely on *NLRB v. Babcock & Wilcox*[73] because the instant case involves balancing employer property rights against the Section 7 rights of employees, and *Babcock* involved balancing employer property rights against the derivative Section 7 rights of nonemployee union organizers. However, we have cited *Babcock & Wilcox* solely for the principle that "[a]ccommodation between [organizational rights and employer property rights] must be obtained with as little destruction of one as is consistent with the maintenance of the other"[74]—and that same principle has been invoked and relied on in cases involving a balancing of employer rights and *employees'* Section 7 rights, including by the Supreme Court in a decision upon which the dissent heavily relies.[75]

Citing *Eastex, Inc. v. NLRB*,[76] *Beth Israel Hospital v. NLRB*,[77] and *Hudgens v. NLRB*,[78] the dissent contends that when employees are "lawfully on the employer's e-mail system," the employer's property right to exclude is irrelevant, and the availability of alternative means is immaterial. These cases, however, like *Republic Aviation,* involved the right to engage in face-to-face communication—not, as here, the right to use employer-

[73] 351 U.S. 105 (1956).

[74] Id. at 112.

[75] See *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 492 (1978). See also, e.g., *St. Margaret Mercy Healthcare Centers v. NLRB*, 519 F.3d 373, 374 (7th Cir. 2008) (invoking *Babcock* accommodation principle in evaluating employer limits on union solicitation by employee nurses); *Stanford Hospital and Clinics v. NLRB*, 325 F.3d 334, 338 (D.C. Cir. 2003) (invoking *Babcock* accommodation principle in determining lawfulness of solicitation and distribution policy applicable to hospital employees); *McDonnell Douglas Corp. v. NLRB*, 472 F.2d 539, 545 (8th Cir. 1973) (invoking *Babcock* accommodation principle in evaluating lawfulness of rule limiting solicitation and distribution on company property by off-duty employees).

[76] 437 U.S. 556 (1978).

[77] Supra.

[78] 424 U.S. 507 (1976).

owned equipment. As we have explained above, this is a distinction of substance.[79] We similarly reject the dissent's attempt to treat as mere dicta decades of Board precedent finding no Section 7 rights to use employers' equipment.[80]

The dissent repeats the claim, advanced in *Purple Communications,* that an employer's property right in its email system is "relatively weak" because the common law of torts imposes liability for trespass to chattels only if "actual harm . . . is proven."[81] Commentators have criticized the application of these tort principles, which long predate the use of electricity, to electronic communications systems.[82] In any event, we cannot agree that an individual's use of personal property is *rightful* simply because it is not *actionable* at common law. This is confirmed by the very treatise cited by the dissent, which presents, as an illustrative example of the principle she invokes, the following hypothetical: "A leaves his car parked in front of a store. B releases the brake on A's car and pushes it three or four feet, doing no harm to the car. B is not liable to A."[83] Even if B is not liable for these acts at common law, we do not believe that B's actions can reasonably be regarded as rightful, and we doubt the dissent would regard them as rightful, either.[84] Indeed, the common law recognized that actions of this type are *not* rightful, albeit by privileging the reasonable use of force for their prevention rather than by providing an action for damages.[85] In sum, "the fact that *liability* for a trespass to personal property requires evidence of harm does not derogate from the owner's *right* to control the use of that property."[86]

Contrary to the dissent, cases addressing the circumstances in which an employer may prohibit employees from affixing union insignia to company-issued hard hats are not contrary to the principles stated herein. To begin with, the Board's early hard hat cases contradict the dissent's position that alternative means of communication are irrelevant to the analysis of the issue this case presents. There, the Board considered the availability of alternative means of communication when determining whether a ban on affixing union insignia to company-provided hard hats was lawful,[87] and it acknowledged

[79] Indeed, taken at face value, our colleague's position would mean that an employer could not assert its property rights to forbid an employee rightfully "on" a photocopier during working time from using the copier to print hundreds or thousands of union flyers during nonworking time, to prevent an employee rightfully "in" a delivery truck for work purposes from using it to drop off those flyers during breaks, or to prohibit an employee rightfully granted access to a hydraulic lift during working time from using it on successive lunch breaks to service a fleet of vehicles for a trip to the employer's headquarters for a planned union protest. Based on the dissent's position, the employers in these hypotheticals would be powerless to refuse (nondiscriminatorily) to permit these uses of their equipment unless they could prove that doing so was necessary to maintain production or discipline—and if no one else needs to use the copier, delivery truck, or lift and the employees are all well-behaved, what's the problem? This is the logical endpoint of our colleague's rationale. Contrary to the dissent, this is not "adapting the Act to the changing patterns of industrial life." It is wrenching *Republic Aviation* loose from its real-property moorings and applying it in ways the Supreme Court never could have anticipated.

The dissent says interference with production or discipline would result from the fact that the equipment in these examples is being "divert[ed]" from the employer's purposes, but we have posited situations in which the equipment would have otherwise been idle. The dissent also says that consuming the paper and gas and wearing out the lift would constitute the necessary interference. We disagree, but very well: assume the employees pay for the paper and gas. As for the lift, "commercial grade 2-post and 4-post lifts will last as long as anyone bothers to maintain them." https://www.kwik-lift.com/2017/12/how-long-vehicle-lifts-last/ (visited Dec. 7, 2019).

[80] Although some of the equipment cases involved discrimination, the principle that there is no right to use employers' equipment for Sec. 7 purposes was plainly part of the Board's holdings in *Mid-Mountain Foods*, supra, 332 NLRB 229, and *Nugent Service*, supra, 207 NLRB at 161, as well as that of the Seventh Circuit in *Guardian Industries Corp.*, 49 F.3d at 318. Moreover, at least five additional courts of appeals have regarded the principle as uncontroversial. See *Health-Bridge Management, LLC v. NLRB*, 798 F.3d 1059, 1073 (D.C. Cir. 2015); *NLRB v. Southwire Co.*, 801 F.2d 1252, 1256 (11th Cir. 1986); *NLRB v. Honeywell, Inc.*, 722 F.2d 405, 406 (8th Cir. 1983); *NLRB v. Container Corp. of America*, 649 F.2d 1213, 1215 (6th Cir. 1981); *Westinghouse Electric & Manufacturing Co. v. NLRB*, 112 F.2d 657, 660 (2d Cir. 1940), affd. 312 U.S. 660 (1941); see also *Skywest Pilots ALPA Organizing Committee v. Skywest Airlines, Inc.*, No. C-07-2688CRB, 2007 WL 1848678, at *13 (N.D. Cal. June 27, 2007).

[81] See *Restatement (Second) of Torts* § 218 (1965).

[82] See R. Clifton Merrell, *Trespass to Chattels in the Age of the Internet*, 80 Wash. U. L. Q. 675, 699 (2002) (criticizing efforts "to put the square peg of cyberspace into the round hole of trespass law"); Dan Burk, *The Trouble with Trespass*, 4 J. of Small & Emerging Bus. L. 27, 39 (2000) ("[T]he elements of common law trespass to chattels fit poorly in the context of cyberspace."). As these commentators note, the trend in the courts has been to find an actionable trespass upon electronic communication systems even in the absence of evidence of the type of harm normally required for liability to attach in the case of trespass to other types of chattels.

[83] *Restatement (Second) of Torts* § 218, comment (i).

[84] We likewise think it is indisputable that an employer does not have the right to break into an employee's personal email account even if liability under common law for such a breach would not attach absent proof of actual harm. *Van Alstyne v. Electronic Scriptorium, Ltd.*, 560 F.3d 199, 208 (4th Cir. 2009).

[85] See *Restatement (Second) of Torts* § 218, comment (e).

[86] *Purple Communications*, 361 NLRB at 1073 (Member Miscimarra, dissenting) (emphasis in original).

[87] See *Standard Oil Co. of California,* 168 NLRB 153, 153 fn. 1 (1967) (finding that employer lawfully enforced rule against "adornments" on employer-provided hard hats against affixing union insignia to hard hats, relying in part on evidence that "employees were freely permitted to wear emblems signifying union affiliation on any part of their clothing except their safety hats"); *Andrews Wire Corp.*, 189 NLRB 108, 109 (1971) (finding that employer lawfully prohibited union insignia on its hard hats, relying in part on evidence that employees could wear insignia on any item of clothing except the hard hats, and citing *Standard Oil*).

that employer property rights bear on that determination.[88] In two later cases, the Board did not consider property rights or alternative means of communication in finding similar bans unlawful.[89] We believe those cases are properly understood as resting on *Republic Aviation*'s specific recognition of a right to display union insignia in the workplace. In our view, the dissent errs by reading them to stand for the broad proposition that property rights are irrelevant whenever, in her words, "an employer restricts the use of company property for Section 7 purposes." Certainly, no such right to use employer-owned equipment for Section 7 purposes is recognized in *Republic Aviation* or any other Supreme Court precedent. Moreover, the dissent's reading of these cases would put them in conflict with Board precedent, discussed above, holding that employees do *not* have a right to use employer-provided equipment for Section 7 purposes.[90] Our decision, in contrast, aligns with this precedent. And *Republic Aviation*'s broad holding concerning the balance to be struck when employees are rightfully on the employer's real property simply does not fit the hard hat cases. For one thing, hard hats are not realty; for another, employees are not "on" the hard hats, the hard hats are on the employees. We also note that reviewing courts have rejected the dissent's view that an employer's property right in its hard hats is irrelevant in determining whether an employer must permit the display of union insignia on them.[91] Our decision is consistent with the views of these courts as well.

In the end, contrary to our dissenting colleague, we believe that there is a difference between email and a hard hat.

Finally, we reject the dissent's contention that, absent access to an employer's email system, employees in the modern workplace will necessarily lack adequate means of communication in order to meaningfully exercise their Section 7 rights. Here, our colleague posits a situation where employees seek to communicate with the entire workforce for the purpose of organizing an employer-wide unit, and she suggests that face-to-face communication is inadequate in those circumstances.[92] But since the earliest days of the Act, multisite bargaining units have been successfully organized—indeed, even units that arguably would be covered by our exception for situations where employer-provided email is the only reasonably available means of workplace communication.[93] If the lack of employer-provided email (or any other form of electronic communication, for that matter) was not an obstacle to organizing, for example, a unit comprised of the crews of 58 trans-oceanic steamships based out of at least 2 different ports,[94] it defies reason to suggest that it is an indispensable tool for communications between and

[88] *Standard Oil Co. of California,* 168 NLRB at 161-162 ("Here the rights which must be balanced are the undisputed right of employees to identify themselves as union members for the purpose of organizing their fellow employees and the equally undisputed right of the Company to control its property and to maintain an effective spot identification system in the interest of the safety of all employees, the preservation of the Company's property, and the safety of the community in which the refinery is located."). Although the dissent suggests that the preceding text is not part of the Board's reasoning, this is simply not the case. The Board disavowed the trial examiner's reliance on the absence of a union organizing campaign at the time the "adornments" rule was enforced. The Board did not disavow the trial examiner's consideration of the employer's property rights. See id. at 153 fn. 1.

[89] See *Malta Construction Co.*, 276 NLRB 1494, 1496 (1985), enfd. 806 F.2d 1009 (11th Cir. 1986); *Eastern Omni Constructors, Inc.*, 324 NLRB 652, 656 (1997), enf. denied 170 F.3d 418 (4th Cir. 1999). To the extent the Board's precedent on this issue has been inconsistent, we believe that *Andrews Wire Corp.* and *Standard Oil Co. of California* better reflect the competing interests at stake.

[90] See cases cited in fn. 17, supra.

[91] Indeed, in *NLRB v. Windemuller Electric, Inc.,* 34 F.3d 384 (6th Cir. 1994), the Sixth Circuit held that employers *can* rely on their property rights to prohibit the display of union insignia on company-owned hard hats. The court reasoned that "[t]he Supreme Court, in the line of cases that originated in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), and culminated in *Lechmere*, has repeatedly declined to let organizational rights trump property rights where there is no apparent need to do so. Nothing in the record of the case before us suggests that any such need exists here. As a matter of law, therefore, the fact that the hard hats were Windemuller's property provided justification enough for Windemuller's refusal to let the hats be stickered with union insignia." Id. at 395; see also *NLRB v. Malta Construction Co.*, 806 F.2d 1009, 1013 (11th Cir. 1986) (Edmondson, J., dissenting) ("Although company ownership of the helmets may not be, in and of itself, the determinative factor, surely it counts for something. It is a circumstance that must be given substantial weight."). Although a subsequent panel of the Sixth Circuit questioned the *Windemuller* court's reliance on property rights rather than a "special circumstances" analysis, *Windemuller* remains the law of the circuit. *Meijer, Inc. v. NLRB*, 130 F.3d 1209, 1215 (6th Cir. 1997).

The Fourth Circuit similarly considered the availability of alternative means of communication in reversing the Board's finding that an employer unlawfully prohibited union insignia on company-owned hard hats. *Eastern Omni Constructors, Inc. v. NLRB*, 170 F.3d 418, 426 (4th Cir. 1999) (ban on union stickers on employer's hard hats lawful, where employees were allowed to wear insignia on all attire except the hard hats; "that an employer prohibits some, but not all, union insignia is a factor that courts, including this one, have looked to in determining whether special circumstances are present."), denying enf. to 324 NLRB 652 (1997).

[92] In an unwarranted aside, the dissent asserts that we seek to require employees to organize in the "largest possible bargaining units," citing *The Boeing Co.*, 368 NLRB No. 67 (2019). As we explained there, we have done no such thing. Instead, we are, "in each case, considering the rights of all employees, included [in the petitioned-for unit] and excluded [from that unit], and the prospects of a stable and productive collective-bargaining relationship." Id., slip op. at 7.

[93] See *Joyce Sportswear Co.*, 226 NLRB 1231 (1976) (unit of "traveling salesmen" who saw one another in person only four times a year).

[94] *Lykes Brothers Steamship Co., Inc.*, 2 NLRB 102 (1936). See also *Capital Coors Co.*, 309 NLRB 322 (1992) (two facilities located 90-100 miles apart); *Great Atlantic & Pacific Tea Co.*, 153 NLRB 1549 (1965) (multistate 20-store unit).

among employees who happen to work on different floors of an office building.

We do not dispute that in some circumstances, an employer's email system may be a more efficient and convenient means of communication than traditional face-to-face methods. But for the reasons already explained, efficiency and convenience alone are insufficient grounds to override an employer's property rights.

G. Application of the New Standard to the Respondent's Rules[95]

1. The "General Restrictions" on the use of the Respondent's IT resources are lawful

As explained above, facially neutral restrictions on the use of employer IT resources are generally lawful to maintain, provided that they are not applied discriminatorily. Here, the computer-usage rules appearing under the heading "General Restrictions," set forth in the margin below,[96] are all facially neutral. There is no suggestion that the Respondent has applied these rules discriminatorily. Nor does any party contend that this is a case where the Respondent's email system furnishes the only reasonable means for employees to communicate with one another. Accordingly, we find that the Respondent did not violate Section 8(a)(1) of the Act by maintaining the above rules.

2. The computer confidentiality rule is severed and remanded together with the noncomputer rules

The rule prohibiting employees from "disclos[ing] or distribut[ing] outside of [the Respondent] any information that is marked or considered confidential or proprietary unless you have received a signed nondisclosure agreement through the Law Department" (the "computer confidentiality rule") is not a restriction on the use of the Respondent's IT systems. Because our decision today does not resolve the lawfulness of the computer confidentiality rule, and the record is insufficient for us to do so, we shall remand the computer confidentiality rule for further proceedings consistent with this decision.

As discussed above, in its prior decision in this case the Board found that four of the non-computer rules were unlawful and four others were lawful.[97] The Board analyzed those rules under the then-applicable "reasonably construe" prong of the Board's decision in *Lutheran Heritage Village-Livonia*.[98] The Board sought enforcement in the Ninth Circuit of its order finding the four non-computer rules unlawful, and the Charging Party sought review of the Board's finding that the other four non-computer rules were lawful.

After the issuance of Judge Anzalone's decision on remand,[99] and while the non-computer rules were pending before the Ninth Circuit, the Board decided *The Boeing Company*,[100] which overruled the *Lutheran Heritage* "reasonably construe" test. In its place *Boeing* set forth a new standard for determining whether an employer's maintenance of a facially neutral work rule unlawfully interferes with employees' Section 7 rights.[101] Under the *Boeing* standard, if a facially neutral rule, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will "evaluate . . . (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule."[102] Having performed this two-step evaluation,

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[95] As stated above, Judge Anzalone determined that the only rule before her was the prohibition on "send[ing] . . . non-business information." The Charging Party cross-excepts to Judge Anzalone's failure to find the other rules quoted above (as well as another rule that is not before us, see footnote 11, supra) to be unlawful. We find merit in the Charging Parties' contention that Judge Anzalone improperly limited the scope of the remand. But as discussed below, we find all of the computer rules, save one, to be lawful, and we shall remand the remaining computer rule for further proceedings.

[96] "Computer resources may not be used to:

. . .

- Share confidential information with the general public, including discussing the company, its financial results or prospects, or the performance or value of company stock by using an internet message board to post any message, in whole or in part, or by engaging in an internet or online chatroom
- Convey or display anything fraudulent, pornographic, abusive, profane, offensive, libelous or slanderous
- Send chain letters or other forms of non-business information
- . . .
- Solicit for personal gain or advancement of personal views
- Violate rules or policies of the Company

Do not visit inappropriate (non-business) websites, including but not limited to online auctions, day trading, retail/wholesale, chat rooms, message boards and journals. Limit the use of personal email, including using streaming media (e.g., video and audio clips) and downloading photos."

[97] *Rio All-Suites*, 362 NLRB at 1691–1694 (finding unlawful confidentiality rule on p. 2.21 of employee handbook, prohibitions on photography and recording (conduct standards Nos. 24 and 35, handbook at pp. 2.20 and 2.21), and prohibition on "walk[ing] off the job" (conduct standard No. 28, handbook at p. 2.20); finding lawful rules concerning "Visiting Property When Not in Uniform" (handbook at p. 2.7), off-duty access to the Respondent's facilities (conduct standard No. 9, handbook at p. 2.19), "Use of Facility" (handbook at p. 2.34), and prohibition on "reveal[ing] confidential information to unauthorized persons" (conduct standard No. 10, handbook at p. 2.19)).

[98] 343 NLRB 646, 647 (2004) (*Lutheran Heritage*).

[99] As noted above, Judge Anzalone did not address the lawfulness of the computer confidentiality rule.

[100] 365 NLRB No. 154 (2017).

[101] Id., slip op. at 3-5.

[102] Id., slip op. at 3.

the Board will find that "the rule's maintenance . . . violate[s] Section 8(a)(1) if . . . the justifications are outweighed by the adverse impact on rights protected by Section 7."[103]

In order to provide certainty and predictability, the Board will, over time, sort employer rules into three categories:

> *Category 1* will include rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. . . .
>
> *Category 2* will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.
>
> *Category 3* will include rules that the Board will designate as *unlawful* to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule.[104]

However, these categories "will represent a classification of *results* from the Board's application of the new test. The categories are not part of the test itself."[105]

Because *Boeing* applies retroactively and the parties had not had the opportunity to address the lawfulness of the non-computer rules under *Boeing*, the General Counsel requested that the Ninth Circuit remand the proceedings before it, which the court granted on April 28, 2018.[106]

The computer confidentiality rule, like the non-computer rules, is governed by the standard announced in *Boeing*.[107] Because the parties have not had the opportunity to address the impact of *Boeing* on either the computer confidentiality rule or the non-computer rules remanded by the Ninth Circuit, we shall sever the computer confidentiality rule from the other computer rules, consolidate it with the non-computer rules, and remand those allegations to Judge Anzalone for further proceedings in light of *Boeing*.

ORDER

IT IS ORDERED that the allegation that the Respondent violated Section 8(a)(1) by maintaining the rule headed "Confidentiality" in the section of the Respondent's handbook entitled "Use of Company Systems, Equipment, and Resources" is severed and consolidated with the allegations remanded by the Court of Appeals for the Ninth Circuit on April 28, 2018, and that the consolidated allegations are remanded to Administrative Law Judge Mara-Louise Anzalone for further appropriate action—including, if necessary, the filing of statements of position and/or reopening the record—and issuance of a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order. Copies of the supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found or remanded.

Dated, Washington, D.C. December 16, 2019

_____
John F. Ring, Chairman

_____
Marvin E. Kaplan, Member

_____
William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[103] Id., slip op. at 16.

[104] Id., slip op. at 3–4 (emphasis in original).

[105] Id., slip op. at 4 (emphasis in original).

[106] The court summarily enforced the Board's order as to the prohibition on "walk[ing] off the job." Accordingly, the remanded rules were the confidentiality rule on p. 2.21 of the handbook and the prohibitions on photography and recording (conduct standards Nos. 24 and 35, handbook at pp. 2.20 and 2.21).

[107] Additionally, because the computer confidentiality rule prohibits the release of "information that is *marked* or *considered* confidential," its lawfulness may turn on whether the non-computer confidentiality rule listing categories of information that may not be disclosed, see *Rio All-Suites*, 362 NLRB at 1691, is itself lawful.

MEMBER MCFERRAN, dissenting in part[1]

The majority's decision aims to turn back the clock on the ability of employees to communicate with each other at work, for purposes that the National Labor Relations Act protects. As the Supreme Court has explained, the Board has the "responsibility to adapt the Act to the changing patterns of industrial life."[2] Email, of course, represents a basic change in the American workplace, which Congress hardly foresaw more than 80 years ago. It is an incontrovertible fact of modern life that "[i]n many workplaces, email has effectively become a 'natural gathering place,' pervasively used for employee-to-employee conversations."[3]

In *Purple Communications*, supra,[4] the Board appropriately recognized this sea change in the nature of workplace communications and fulfilled its statutory responsibility to keep labor law current when it held that *if* an employer gives employees access to an e-mail system, then it must let them use the system (on nonworking time) to communicate with each other for statutorily-protected purposes, *unless* the employer can prove that the need to maintain production or discipline, or to preserve the efficiency of the system itself, justifies restricting or prohibiting use of the system.

That was then; this is now. Today, the majority overrules *Purple Communications* and, in its place, resurrects an approach that not only is out of touch with modern workplace realities, but that also contradicts basic labor-law principles, long reflected in the decisions of the Supreme Court and the Board. The Court has stated unequivocally that "[n]o restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline."[5] The majority ignores this clear direction. For the majority, employees' use of their employer's email system is almost entirely a matter of the employer's control over its property. Employers "have a property right to control the use" of their email and other communications systems, the majority insists, and the employer's property right is not "required to yield" to employees' Section 7 rights "absent proof that employees would otherwise be deprived of any reasonable means of communicating with each other, or proof of discrimination." Subordinating the Act by misapplying absolutist notions of private property rights is, indeed, an unfortunate theme of the Board's recent decisions.[6] But the rationale offered by the majority here is untenable as a matter of law—unless the clock is turned back not just before 2014, when *Purple Communications* was decided, but before 1935, when the Act was passed and the Administrative Procedure Act was not yet law.

I.

Contrary to the majority's representation, the Board's holding in *Purple Communications* was a limited one that carefully balanced employees' statutory rights and employers' legitimate interests. The Board adopted a presumption that

[1] For institutional reasons, I concur in the decision to sever and remand the issues involving the Respondent's computer confidentiality rule for application of the standard announced in *Boeing Co.*, 365 NLRB No. 154 (2017), although I dissented from that decision and adhere to my dissenting view. Contrary to the majority, I would apply *Purple Communications, Inc.*, 361 NLRB 1050 (2014), and find that the Respondent's two rules prohibiting the use of "computer resources" to "[s]olicit for personal gain or [the] advancement of personal views" or to "[s]end[] chain letters or other forms of non-business information" are unlawful, insofar as those rules ban all use of the Respondent's email system for nonbusiness distribution and solicitation and the Respondent did not argue or present any "special circumstances" to justify its total ban on the nonwork use of email to maintain production or discipline. Further, I would find the remaining three computer usage rules—prohibiting conveying fraudulent information, violating the company's policies, and prohibiting visitation of nonbusiness websites—lawful under *Purple Communications.* Finally, I would find that Purple Communications, which applies only to email, does not apply to the Respondent's work rule that prohibits the "shar[ing] of confidential information to the general public . . .by using internet message board to post a message . . . or by engaging in an internet or online chatroom."

The Charging Party has filed a motion seeking the recusal of Member Emanuel, based on the fact that his former law firm has represented the respondent employer in the decision overruled today, which is pending on appeal. See fn. 3, infra. Member Emanuel has chosen to participate in the Board's decision, for reasons he has explained there, following consultation with the Board's Designated Agency Ethics Official (DAEO). I interpret the Charging Party's motion as directed to Member Emanuel individually, not to the Board itself. For that reason, and because I dissent from the Board's decision in any case, I do not address the motion. As I have previously noted, the Board's rules—in contrast to those of certain other administrative agencies—do not address the question of disqualification of a Board member by the Board as a body, and the Board's practice in that regard has varied over the years. *Hy-Brand Industrial Contractors, Ltd.*, 366 NLRB No. 93, slip op. at 5 fn. 4 (2018) (concurring opinion) (collecting cases). I believe that the Board should adopt such a rule. See National Labor Relations Board, *Ethics Recusal Report* (Nov. 19, 2019) (Statement of Member McFerran), available at www.nlrb.gov/reports/other-agency-reports/ethics-recusal-report.

[2] *NLRB v. J. Weingarten*, 420 U.S. 251, 266 (1975).

[3] *Purple Communications, Inc.*, 361 NLRB 1050, 1057 (2014) quoting *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 505 (1978).

[4] That case is pending before the U.S. Court of Appeals for the Ninth Circuit on petitions for review and a cross-petition for enforcement (Nos. 17-70948, 17-71062, and 17-71276). At the Board's request, the Ninth Circuit stayed proceedings on September 24, 2018, after the Board issued a notice and invitation to file briefs in this case, suggesting that it might overrule its *Purple Communications* decision.

[5] *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956), citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

[6] See, e.g., *Kroger Limited Partnership I Mid-Atlantic*, 368 NLRB No. 64, slip op. at 14 (2019) (dissenting opinion) (collecting cases that reverse Board precedent involving access to employer property).

> that employees who have rightful access to their employer's email system in the course of their work have a right to use the email system to engage in Section 7-protected communication on nonworking time. An employer may rebut the presumption by demonstrating that special circumstances necessary to maintain production or discipline justify restricting its employees' rights.

361 NLRB at 1063.[7] That decision "encompasse[d] email use by employees only"; the Board did "not find that nonemployees have rights to access an employer's email system."[8] Nor did the Board "require an employer to grant employees access to its email system where it has not chosen to do so."[9] The presumption of access, meanwhile, was "expressly limited to nonworking time."[10]

In adopting this rule, the Board overruled its own prior decision in *Register Guard*, which had held categorically that employees have no statutory right to use their employers' email system for Section 7 purposes. The Board rejected *Register Guard's* analysis for three reasons: (1) that it "undervalued employees' core Section 7 right to communicate in the workplace about their terms and conditions of employment, while giving too much weight to employers' property rights;"[11] (2) that it "inexplicably failed to perceive the importance of email as a means by which employees engaged in protected communications;" and (3) that it "placed more weight on the Board's equipment decisions than those precedents can bear."[12]

First, the *Purple Communications* Board examined the "centrality of employees' workplace communication to their Section 7 rights," reflected in a series of Supreme Court decisions[13] clearly establishing that the effective exercise of such statutory rights "necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite."[14] Next, the Board painstakingly detailed abundant evidentiary support for the seemingly self-evident conclusion that email has transformed workplace communications and has, in many workplaces, become the default mode of efficient communication. Finally, the Board turned to the "equipment" precedents that *Register Guard* relied on heavily. It concluded first that "email systems are different in material respects from the types of workplace equipment the Board has considered in the past," citing email's "flexibility and capacity" in contrast to bulletin board and telephone lines.[15] Moreover, based on a painstaking reading of the decisions, the Board observed that the "broad pronouncements in the equipment cases, to the effect that employers may prohibit all nonwork use of such equipment," were "best understood as dicta"[16] because a "reading of Board precedent that would allow total bans on employee use of an employer's personal property, even for Section 7 purposes, with no need to show harm to the owner," was "impossible to reconcile with . . . common-law principles" applicable to personal property (as opposed to real property).[17]

After rejecting the *Register Guard* analysis, the *Purple Communications* Board adopted a "new analytical framework," which took the Supreme Court's 1945 decision in *Republic Aviation*[18] as a "starting point."[19] There, the Court had upheld the Board's presumption that an employer ban on oral solicitation by employees during nonworking time was unlawful, unless the employer demonstrated that "special circumstances made the rule necessary in order to maintain production or discipline."[20] "[F]or nearly 70 years," *Purple Communications* observed, "the Board ha[d] applied *Republic Aviation* to assess employees' right to engage in Section 7 activity on their employer's premises, i.e., real property" and, consistent with the Supreme Court's decisions, had "sought to accommodate the employees' Section 7 rights and the employers' property and management rights," recognizing "that employees' interests are at their strongest when "'the [Section 7] activity [is] carried on by em-

[7] The Board has addressed the "special circumstances" aspect of the *Purple Communications* standard only once, properly rejecting the employer's justification for its e-mail restriction. *UPMC*, 362 NLRB 1704 (2015). The majority here is correct, then, that the Board "has never found special circumstances justifying a prohibition on nonwork-related email," but the Board has barely been presented with the occasion to address the issue.

[8] Id. at 1063 (footnote omitted).

[9] Id. at 1063–1064.

[10] Id. at 1064 (footnote omitted).

[11] Sec. 7 of the Act grants employees the "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. §157.

[12] 361 NLRB at 1053.

[13] Id. at 1054, citing, inter alia, *Beth Israel Hospital*, supra, 437 U.S. at 491–492); *Eastex, Inc. v. NLRB*, 437 U.S. 556, 574 (1978); *NLRB v. Magnavox Co. of Tennessee*, 415 U.S. 322, 325 (1974); *Central Hardware Co. v. NLRB*, 407 U.S. 539, 542-543 (1972).

[14] *Beth Israel Hospital*, supra, 37 U.S. at 491–492

[15] 361 NLRB at 1057. The *Purple Communications* Board explained that the "'equipment cases' … involved far more limited and finite resources," observing that "'if a union notice is posted on a bulletin board, the amount of space available for the employer to post its messages is reduced'" and "'[i]f an employee is using a telephone …, that telephone line is unavailable for others to use.'" Id., quoting *Register Guard*, supra, 351 NLRB at 1125–1126 (dissenting opinion).

[16] 361 NLRB at 1058.

[17] Id. at 1060. See Restatement (Second) of Torts, § 218.

[18] *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

[19] Id.

[20] Id. at 804 fn. 10.

ployees already rightfully on the employer's property.'"[21] The Board acknowledged the "significant differences" between an e-mail system and employer land and facilities, explaining that it accordingly "appl[ied] *Republic Aviation* and related precedents in some but not all respects."[22] Nonetheless, the Board concluded that it was "consistent with the purposes and policies of the Act, with [the Board's] responsibility to adapt the Act to the changing work environment, and with [the Board's] obligation to accommodate the competing rights of employers and employees for [the Board] to adopt a presumption in this case like the one that [was] adopted in *Republic Aviation"* and thus the Board established a presumption that workers can use their employer-provided email for Section 7 activity during nonworking time in the absence of special circumstances.

II.

Today, the Board reverses course again, abandoning the nuanced and well-reasoned approach adopted in *Purple Communications* and reverting to the categorical rule of *Register Guard* in holding that "there is no statutory right for employees to use employer-provided email for nonwork, Section 7 purposes in the typical workplace."[23] When an agency reverses its own precedent, the Supreme Court has held, it must "provide a reasoned explanation for the change."[24] The majority has failed to do so.

The twin premises of the majority's decision are that *Purple Communications* is not even a permissible interpretation of the National Labor Relations Act and that its own interpretation is compelled by the Supreme Court's decision in *Babcock & Wilcox*, supra, where the Court held that nonemployee union organizers were statutorily entitled to access to an employer's property only if employees were otherwise inaccessible or the employer had discriminated in granting access. Neither premise is correct, and that error alone requires reversal. When the Board mistakenly believes that a particular interpretation of the Act is mandated, it has failed to properly exercise its administrative discretion and its decision cannot stand.[25] That is the case here. Nothing in the text, structure, or legislative history of the Act resolves the question whether employees who have been granted access to an employer's email system have a statutory right to use the system for statutorily-protected communications. Nor does any decision of the Supreme Court require the Board to answer the email-use question in a particular way. The Board may be free to reject the reasoning of *Purple Communications* and free to reach a different result, but it is not free to treat this reversal of precedent as required, as opposed to chosen.

But the majority's errors do not end there. Even if the result the majority reaches today is assumed to be a permissible interpretation of the Act, the reasoning offered *for* that result is insufficient. As the Supreme Court has held, in a case involving the Board, "[n]ot only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational."[26] This principle applies with full force when the Board engages in a balancing analysis to determine a question of employee access rights.[27] The flaws in the majority's reasoning are clear, and there are several.

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[21] Id. at 1061 (brackets in original), quoting *Hudgens v. NLRB*, 424 U.S. 507, 521–522 fn. 10 (1976).

[22] Id. at 1061. In particular, the Board declined to "treat email communication as either solicitation or distribution per se" and found it "unnecessary to characterize email systems as work areas or nonwork areas." Id. at 1061-1062.

[23] *Register Guard* sharply divided the Board at the time. In dissent, Members Liebman and Walsh observed that the decision "confirm[ed] that the NLRB ha[d] become the 'Rip Van Winkle' of administrative agencies'": "Only a Board that has been asleep for the past 20 years could fail to recognize that e-mail has revolutionized communication both within and outside the workplace." *Register Guard*, supra, 351 NLRB at 1131 (dissenting opinion). "In 2007," the *Register Guard* dissenters wrote, "no one can reasonably contend … that an e-mail system is a piece of communications equipment to be treated just as the law treats bulletin boards, telephones, and pieces of scrap paper." Id.

Not surprisingly, the *Register Guard* decision drew the strong criticism of labor law scholars. See *Purple Communications*, supra, 361 NLRB at 1050 fn. 5 (collecting scholarly criticism). See also Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 Duke L. J. 2013, 2069–2072 (2009). Professors Fisk and Malamud observed that the "philosophical position reflected in the case"—"read[ing] the employer's property rights in the email server to trump the employees' [S]ec[.] 7 rights to communicate"—was a "significant departure from past practice" as reflected in the decisions of the Board and the Supreme Court. 58 Duke L. J. at 2070 (citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945)). They noted that the *Register Guard* Board had "discussed no data to address . . . whether there was any legitimate employer need to restrict employee use of email systems" and observed that "[i]f one does not accept the . . . assertion that the employer's mere ownership of the email sever answers the question . . . there is little else in the opinion that would help one decide whether [S]ec[.] 7 [of the Act] protects the right to communicate via the employer's email server." Id. at 2071.

[24] *Encino Motorcars, LLC v. Navarro*, ___ U.S. ___, 136 S. Ct. 2117, 2125–2126 (2016).

[25] See, e.g., *Prill v. NLRB*, 755 F.2d 941, 942 (D.C. Cir. 1985) ("[J]udicial deference is not accorded a decision of the NLRB when the Board acts pursuant to an erroneous view of law and, as a consequence, fails to exercise the discretion delegated to it by Congress."). See also *IB EW, Local Union No. 474 v. NLRB*, 814 F.2d 697, 707-78 (D.C. Circ. 1987) (following *Prill*, supra). In reversing *Register Guard*, in contrast, the *Purple Communications* Board never claimed that the Act or Supreme Court precedent dictated the resolution of the e-mail access issue.

[26] *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998).

[27] See, e.g., *ITT Industries, Inc. v. NLRB*, 251 F.2d 995, 1004 (D.C. Cir. 2001) (remanding Board's initial decision that off-duty, off-site

A.

First, the majority errs in failing to properly acknowledge that the e-mail use issue, as decided by *Purple Communications*, involves (1) employees of the employer, not nonemployees, (2) who have already been granted access to the e-mail system by the employer for non-Section 7 uses. Under Supreme Court precedent, these facts are crucial to a proper balancing of the Section 7 rights of employees and the countervailing rights and interests of employers. In light of the Supreme Court's decisions, the appropriate focus here is not on the employer's supposed property right to exclude employees from the email system—as if (as in *Babcock & Wilcox*) they were nonemployees, such as union organizers, who may be denied access to the employer's real property to communicate with employees—but on what potential harm employee use of the e-mail system during nonworking time poses to the employer's legitimate interests in maintaining production and discipline as well as the efficiency of the email system. And because the issue here involves the Section 7 rights of employees who are both lawfully on the employer's real property and lawfully on the employer's email system, the availability of alternative means of communication is immaterial—as the decisions of the Supreme Court, the federal appellate courts, and the Board all demonstrate.

1.

In *Hudgens*, supra, the Supreme Court addressed the issue of whether warehouse employees had a Section 7 right to picket at a shopping mall near the entrances of their employer's retail store. Identifying the relevant considerations, the Court distinguished cases such as *Babcock & Wilcox*, where *nonemployees* sought access to employer property, and, citing *Republic Aviation*, observed that:

> A wholly different balance was struck when the organizational activity was carried on by *employees already rightfully on the employer's property*, since the employer's *management interests rather than his property interests* were there involved. [Citation to *Republic Aviation*.] This difference is "one of substance."

424 U.S. at 521 fn. 10 (emphasis added), quoting *Babcock & Wilcox*, supra, 351 U.S. at 113. After *Hudgens*, the Court has continued to adhere to the "difference … of substance" between property interests and management interests, between employees and nonemployees, and between cases like *Republic Aviation* and cases like *Babcock & Wilcox*. It did so in *Beth Israel Hospital*, supra, which involved restrictions on solicitation and distribution by hospital employees, and in *Eastex*, supra, which also involved distribution by employees at work.[28]

Quoting *Hudgens*, and distinguishing *Babcock & Wilcox*, the *Beth Israel Hospital* Court explained that in the case before it, the "employees' interests are at their strongest," because the "'activity was carried on by employees already rightfully on the employer's property," and thus the "'employer's management interests rather than his property interests [are] involved."[29] Similarly, in *Eastex*, the Court cited *Hudgens* and observed that in opposing the distribution of literature by employees, the employer's "reliance on its property right is largely misplaced" because "as in *Republic Aviation*, . . . employees are 'already rightfully on the employer's property," so that . . . it is the 'employer's management interest rather than [its] property interests' that primarily are implicated."[30] The employer, meanwhile, had "made no attempt to show that its management interests would be prejudiced in any way by the exercise of [Section] 7 rights proposed by its employees."[31] The *Eastex* Court held that the Board was "entitled to view the intrusion by employees on the property rights of their employer as quite limited in this context as long as the employer's management rights are adequately protected."[32]

The federal courts of appeals have followed *Hudgens*, *Beth Israel Hospital*, and *Eastex* in holding that when employees are rightfully on the employer's property, the "proper balance is between their right to organize and an employer's managerial rights."[33] Thus, it is mistaken (as the District of Columbia Circuit has explained) to argue the Board is "required to conduct a balancing of [the employer's] *property* interests against its employees' organizational interests": that argument "ignores the differ-

employees were entitled to access to employer's property). In *ITT Industries*, the District of Columbia Circuit observed that "' [i]n determining whether an agency's interpretation represents a reasonable accommodation of conflicting statutory purposes, a reviewing court must determine both whether the interpretation is arguably consistent with the underlying statutory scheme in a substantive sense and whether 'the agency considered the manner in a detailed and reasoned fashion.'" 251 F.3d at 1004, quoting *Rettig v. PBGC*, 744 F.2d 133, 151 (D.C. Cir. 1984).

[28] The majority's attempt to minimize its reliance on *Babcock & Wilcox* is belied by the rationale of the majority decision here, which turns entirely on the supposed strength of employers' property rights and on the rejection of the *Republic Aviation* "special circumstances" test.

[29] 437 U.S. at 504–505 (brackets in original), quoting *Hudgens*, supra, 424 U.S. at 521–522 fn. 10.

[30] 437 U.S. at 572–573 (brackets in original), quoting *Hudgens*, supra, 424 U.S. at 521–522 fn. 10.

[31] 437 U.S. at 573.

[32] Id. at 574.

[33] *DHL Express, Inc. v. NLRB*, 813 F.3d 365, 374 (D.C. Cir. 2016) (affirming Board's holding that employer committed unfair labor practice by prohibiting nonworking employees from distributing literature in hallway of employer's facility).

ences between employees and strangers and fails to distinguish property rights from managerial rights."[34] The "critical point" is that "while the [employer] may be able to dictate the terms of access to strangers, contractors, and other business invitees, 'no restriction may be placed on the employees' right to discuss self-organization *among themselves*, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline.'"[35]

The majority is demonstrably wrong, then, when it frames the issue here in terms of balancing employees' Section 7 rights and employers' *property* rights. There can be no dispute that employees who are at work and who have been granted access to an employer's e-mail system are rightfully on the employer's property. The proper balance, as Supreme Court precedent establishes, is thus between employees' Section 7 rights and employers' *management* interests. And this means that the employer's restriction on employees' exercise of their statutory rights will be lawful only when the employer can establish that it is necessary to maintain production or discipline. Under the majority's test, however, an employer is not required to make such a showing; rather, invoking its property right to control the e-mail system is sufficient. That test is invalid because it makes no sense even in property-law terms,[36] but in any case, it cannot be reconciled with Supreme Court precedent.

2.

For essentially the same reasons, the majority also errs in establishing a test that is based on whether employees have alternative means of communicating with each other at work, rather than using the employer's e-mail system (to which they have already been granted access). The Supreme Court's decisions, beginning with *Republic Aviation*, establish that when employees, already rightfully on the employer's property, seek to communicate with each other for Section 7 purposes, the issue of alternative means of communication is immaterial. As the *Eastex* Court explained, distinguishing *Babcock & Wilcox*:

> In *Republic Aviation* the Court upheld the Board's ruling that an employer may not prohibit its employees from distributing union organizational literature in nonworking areas of its industrial property during nonworking time, absent a showing by the employer that a ban is necessary to maintain plant discipline or production. *This ruling obtained even though the employees had not shown that distribution off the employer's property would be ineffective.*

437 U.S. at 571 (emphasis added), citing *Republic Aviation*, supra, 324 U.S. at 798–799.

The *Republic Aviation* Court pointed out that in neither of the consolidated cases before it could "it properly be said that there was evidence or a finding that the plant's physical location made solicitation away from company property ineffective to reach prospective union members"—in contrast to cases where employees were otherwise inaccessible because of their location, such as a "mining or lumber camp."[37] Yet the Court endorsed the Board's holding that the employer was required to permit solicitation on nonworking time, absent a showing of "special circumstances" that made a prohibition "necessary in order to maintain production or discipline."[38]

In the more than 70 years since *Republic Aviation* was decided, the Supreme Court has never adopted or approved a different approach; to the contrary, it has consistently treated alternative means of communication as immaterial when the Section 7 rights of employees rightfully on the property are concerned. The Court's *Magnavox* decision, supra, illustrates this consistency. There, the Court held that a union could not waive the Section 7 rights of represented employees to engage in literature distribution that the employer could not otherwise lawfully prohibit. The "availability of alternative channels of communication," the Court noted, was not a consideration, because the waiver, if permitted, "might seriously dilute [Section] 7 rights."[39] In *Beth Israel Hospital*, meanwhile, the Court observed that the "availability of alternative means of communication is not, with respect to employee organizational activity, a necessary inquiry."[40]

Citing *Republic Aviation*, *Eastex*, and *Magnavox*, the District of Columbia Circuit has concluded that "[i]t is well established that the availability of other channels of communication does not justify employer restraint of employees' Section 7 rights in nonwork areas at nonwork times."[41] Here, however, the majority says that it does. There is no support for the majority's position in Supreme Court precedent—or in Board precedent, which is

[34] Id. at 375.

[35] Id. (emphasis in original), quoting *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 533 (1992).

[36] I discuss that point below.

[37] 324 U.S. at 798-799.

[38] Id. at 803 & fn. 10.

[39] 415 U.S. at 325–327. The *Magnavox* Court thus rejected the dissenting view that, at least as to supporters of the union, the waiver was proper, because those employees had access to company bulletin boards, among other alternative means of expressing their views. See id. at 331–332 (dissent).

[40] 437 U.S. at 505.

[41] *Helton v. NLRB*, 656 F.2d 883, 896 (D.C. Cir. 1981).

emphatically contrary to the majority.[42] According to the majority, "[p]roperly understood, *Republic Aviation* stands for the twin propositions that employees must have 'adequate avenues of communication' in order to meaningfully exercise their Section 7 rights and that employer property rights must yield to Section 7 rights when necessary to avoid creating an '*unreasonable'* impediment to the exercise of the right to engage in self-organization'" (emphasis in original).[43] But, as demonstrated, the Supreme Court has never interpreted the Act, or its own decision in *Republic Aviation*, to condition the Section 7 communication rights of employees rightfully on the employer's property on a showing that they lack alternative means of communication. Nor has the Board—until today. And because this position is inconsistent with the Court's precedent, it cannot stand.

B.

Second, the majority is mistaken in its understanding of the Board's equipment cases and their application to the issue presented here. The majority is wrong to equate an e-mail system with other types of employer equipment (as the *Purple Communications* Board explained in reversing *Register Guard*) and wrong, in any case, in concluding that the equipment decisions support a rule that completely prohibits employees from using equipment for Section 7 communication, after they have been permitted to use the equipment for other purposes. The conclusion that simply because the e-mail system is the property of the employer, the employer is entitled to prevent its use for Section 7 communication is contrary to decisions (addressed neither in *Register Guard* nor by the majority) that involve the right of employees to place union insignia on *employer-owned* hardhats.

There is no need to repeat the careful review of the equipment cases conducted by the *Purple Communications* Board, which correctly concluded that they were materially distinguishable. A bulletin board or an old-fashioned telephone are not the equivalent of an e-mail system, and given the different nature of the mediums, the employer's managerial interests in restricting use are simply not equivalent. Moreover, as the *Purple Communications* Board thoroughly explained, even apart from these relevant factual distinctions the statements in the equipment cases seized on by the *Register Guard* majority that purportedly supported an absolute ban on employee use of employer email systems were best understood as dicta.[44]

Here, the majority makes no real effort to argue that the *Purple Communications* Board misread the equipment cases, and none of those cases relied on the rationale that the majority offers today. It is notable, too, that *Register Guard* dramatically changed the legal landscape in which the equipment cases arose by sharply narrowing the Board's definition of unlawful discrimination in access: when the equipment cases were decided, it was well established that an employer that permitted employees to use its bulletin board (for example) for any nonwork-related purpose could not lawfully prohibit employees from using the bulletin board for Section 7 purposes.[45] Thus, *Register Guard* hardly represented an effort to maintain continuity in Board precedent.

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[42] The District of Columbia Circuit has observed that the Board "has consistently ruled that the presence of alternative methods of communication is not relevant in determining the rights of employees." *Helton*, supra, 656 F.2d at 897 fn. 71, citing, inter alia, *H. & F. Binch Co.*, 168 NLRB 929, 935 (1967). See, e.g., *Capital Medical Center*, 364 NLRB No. 69, slip op. at 4 fn. 12 & 5 fn. 14, 17 (2016), enfd. 909 F.3d 427 (D.C. Cir. 2018) (rejecting argument that Board had impermissibly failed to consider alternative means of communication in case involving on-site picketing by off-duty employees); *The Firestone Tire & Rubber Co.*, 238 NLRB 1323, 1324 (1978); *Diamond Shamrock Co.*, 181 NLRB 261, 261–262 (1970), enf. denied 443 F.2d 52 (3rd Cir. 1971); *Cone Mills Corp.*, 174 NLRB 1015, 1020–1021 (1969); *General Aniline & Film Corp.*, 145 NLRB 1215, 1219 (1964).

The Board's decision in *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962), cited by the majority, is not to the contrary, despite the majority's apparent implication. The Board there held that employers lawfully could limit employees' distribution of literature to *nonworking* areas of its property, given the employer's heightened interest in "cleanliness, order, and discipline" in working areas. Id. at 620. Notably, the *Stoddard-Quirk* Board rejected the employer's argument that the Act did not require permitting employees to engage in distribution on its property, because employees could effectively distribute literature "outside its premises, but near the main plant entrance." Id. at 622. This argument, the Board explained, was inconsistent with the distinction between the rights of employees and those of nonemployees, as drawn by the Supreme Court in *Babcock & Wilcox*, supra. Id.

The majority, quoting *Stoddard-Quirk*, asserts that "the scope of any limitation on employer property rights in equipment must . . . 'be determined by the nature of the need' and, where necessary to accommodate Section 7 rights, 'kept to a minimum.'" But, as shown, this case implicates less employers' property rights, but rather their management interests, because the question presented is whether employees who have been granted access to an employer's e-mail system must be permitted to use it for Sec. 7 communications, absent special circumstances. And, insofar as this case might require an accommodation of employees' Sec. 7 rights and employer property rights, property rights do not have primacy, as the majority suggests. Rather, as the Supreme Court has explained, the "locus of … accommodation" depends on the "nature and strength" of the respective rights "in a "given context." *Hudgens*, supra, 424 U.S. at 522.

[43] The majority's argument about the proper interpretation of *Republic Aviation* is misdirected in any case. Its premise is that the *Purple Communications* Board treated *Republic Aviation* as compelling the Board's holding there, but this premise is false, as any fair reading of *Purple Communications* reveals. See *Purple Communications*, supra, 361 NLRB at 1061 (explaining that the Board would "apply *Republic Aviation* and related precedents *by analogy in some but not all respects*") (emphasis added).

[44] 361 NLRB at 1057–1059.

[45] *Register Guard*, supra, 351 NLRB at 1117–1119 (reversing Board precedent, citing *Fleming Co.*, 336 NLRB 192 (2001), enf. denied 349

Indeed, one line of Board equipment cases flatly contradicts the approach that the majority revives today. The Board has held that employers must permit employees to wear union insignia on employer-owned hardhats, squarely rejecting the argument that because the hardhat was the employer's property, the employer was entitled to control what was affixed to the hardhat, even without showing special circumstances that made a restriction necessary to maintain production or discipline or to ensure safety.[46] Wearing union insignia, of course, is a form of communication. It might well be argued that a hardhat and an e-mail system are different, but the majority cannot have it both ways: if the Board's equipment cases bear on the issue presented in this case, then the majority must somehow square its approach here with the hardhat cases. As the District of Columbia has explained, "when the Board fails to explain—or even acknowledge—its deviation from established precedent, 'its decision will be vacated as arbitrary and capricious.'"[47] The majority's tortured attempt to reconcile today's decision with the Board's employer-owned hardhat precedent is unsuccessful, as a careful reading of the cases proves.[48]

F.3d 968 (7th Cir. 2003), and *Guardian Industries*, 313 NLRB 1275 (1994), enf. denied 49 F.3d 317 (7th Cir 1995). See also *Register Guard*, supra, 351 NLRB at 1127-1130 (dissent) (addressing majority's reversal of precedent). See also *Roadway Express, Inc. v. NLRB*, 831 F.2d 1285, 1290 (6th Cir. 1987) (observing that "where by policy or practice the company permits employee access to bulletin boards for any purpose, [S]ection 7 of the Act . . . secures the employees' right to post union materials" and that "it is well established that the availability of other channels of communication does not justify employer restraint of employees' [S]ection 7 rights"); *NLRB v. Honeywell, Inc.*, 722 F.2d 405, 406–407 (8th Cir. 1983) (affirming Board's finding that employer unlawfully prohibited employees from posting union-related materials on bulletin board, despite permitting personal messages); *Arkansas-Best Freight System*, 257 NLRB 420, 423 (1981) (collecting Board cases involving discrimination in bulletin-board access).

[46] See, e.g., *Malta Construction Co.*, 276 NLRB 1494, 1494 (1985), enfd. 806 F.2d 1009 (11th Cir. 1986). See also *Eastern Omni Constructors, Inc.*, 324 NLRB 652, 656 (1997) (rejecting argument that employer could lawfully prohibit union insignia on employer-owned hardhats, because it permitted union insignia on employees' clothing), enf. denied 170 F.3d 418 (4th Cir. 1999).

[47] *ABM Onsite-Services West, Inc. v. NLRB*, 849 F.3d 1137, 1146 (D.C. Cir. 2017), quoting *Manhattan Ctr. Studios, Inc. v. NLRB*, 452 F.3d 813, 816 (D.C. Cir. 2006). See also *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("[T]he requirement that an agency provide a reasoned explanation for its action … demand[s] that it display awareness that it *is* changing position.").

[48] In *Malta Construction*, supra, the Board—citing the Supreme Court's decision in *Republic Aviation*—expressed its "disagree[ment] with the [administrative law] judge's recitation of the law, to wit, that '[n]o union or employee has a statutory right to use company property for a personal motive,'" including a "union purpose." 276 NLRB at 1494. It is no answer to say, as the majority does, that Supreme Court precedent—including *Republic Aviation*—does not recognize a "right to use employer-owned equipment for Section 7 purposes" or that *Republic Aviation* "does not fit the hard hat cases." Plainly, the *Malta Construction* Board interpreted *Republic Aviation*, which involved the statutory right of employees to wear union insignia on the employer's property, as rebutting the judge's view of the law. *Malta Construction* and other hardhat cases demonstrate that under Board law, the *Republic Aviation* "special circumstances" test (and not a property-rights analysis) applies when an employer restricts the use of company property for Sec. 7 purposes. See, e.g., *Malta Construction*, 276 NLRB at 1495 (finding that employer "failed to establish any special circumstances based on legitimate production or safety reasons to justify [the] prohibition" of union insignia on company hardhats).

The majority is also demonstrably mistaken when it asserts (1) that the Board "has considered the availability of alternative means of communication when determining whether a ban on affixing union insignia to company provided hardhats was lawful" and (2) that the Board has "acknowledged that employer property rights bears on the determination." In the hardhat cases, as in other Board cases involving employee communication at work (see cases collected at fn. 41, supra), alternative means of communication are immaterial. In *Malta Construction*, for example, the Board found the prohibition unlawful despite the fact that the employer "allowed its employees to wear union insignia on articles of their personal attire." 276 NLRB at 1494. This fact was relevant only insofar as it demonstrated the absence of "disparate treatment." Id.

Andrews Wire Corp., 189 NLRB 108 (1971), cited by the majority, is not to the contrary. There, the Board found no violation of the Act, because the employer had "showed that it had a legitimate and not unwarranted concern about the threat to safety posed by the use of unauthorized decorations on work hats." Id. at 109. That employees were free to "wear union insignia on any item of clothing except the safety hat" substantiated the employer's showing of special circumstances and demonstrated the absence of a discriminatory motive for the prohibition. Id. The Board's decision makes no mention of "alternative means of communication."

Nor does *Standard Oil of California*, 168 NLRB 153 (1967), support the majority's position with respect to the relevance of employer property rights or alternative means of communication. In that case, the *Board's* rational—as opposed to the rationale of the administrative law judge—appears in footnote 1 of the decision. 168 NLRB at 153 fn. 1. There, the Board explained that the employer "had established that it had a legitimate, longstanding, and not unwarranted concern about the threat to safety posed by the use of unauthorized decorations on work hats." Id. As in *Andrews Wire,* supra, the fact that employees were permitted to wear union insignia on other clothing substantiated the employer's showing but was not independently relevant as somehow reflecting alternative means of communication. Id. The judge's discussion of the employer's property rights, meanwhile, was offered in the context of applying *Republic Aviation*—precisely the test rejected by my colleagues. Id. at 161–162. Insofar as the Board's decision endorsed the judge's reasoning, then, it endorsed the application of *Republic Aviation*.

Contrary to the majority's assertion, there is thus no conflict at all between *Standard Oil* (decided in 1967) and *Andrews Wire* (1971), on the one hand, and the Board's later decisions in *Malta Construction* (1985), and *Eastern Omni Constructors* (1997).

Finally, the majority's position is not helped by the cited decisions of two federal appellate courts (the Fourth and Sixth Circuits) *rejecting* the Board's view in those cases that the employer had unlawfully prohibited union insignia on company hardhats and relying on the fact that the employer had permitted wearing insignia elsewhere. See *Eastern Omni Constructors, Inc. v. NLRB*, 170 F.3d 418 (4th Cir. 1999); *NLRB v. Windemuller Electric, Inc.*, 34 F.3d 384 (6th Cir. 1994). Those decisions obviously are contrary to Board precedent—not to mention Supreme Court precedent explaining that the existence of alternative

C.

Finally, although the majority's basic error here is in framing this case in terms of the accommodation between employees' Section 7 rights and employers' *property* rights rather than its managerial interests, the majority's decision would still reflect a failure to engage in reasoned decisionmaking even if a property-rights framework were appropriate. In *Hudgens*, supra, the Court explained that where property rights are implicated, the "basic objective under the Act" is the "accommodation of [Section] 7 rights and private property rights 'with as little destruction of one as is consistent with the maintenance of the other.'"[49] The "locus of that accommodation … may fall at different points along the spectrum depending on the nature and strength of the respective [Section] 7 rights and private property rights asserted in any given context."[50] The majority, however, has failed adequately to analyze the "nature and strength" of the Section 7 rights implicated here, relative to the asserted property rights of employers in their email systems. In short, the majority has arbitrarily failed to consider "an important aspect of the problem" that today's decision purports to resolve by reversing Board precedent.[51] The result is a purported "locus of . . . accommodation" that has not been satisfactorily explained, assuming it can be.

1.

Employees' Section 7 rights here are at their strongest. Again, the issue presented is whether employees (not nonemployees) already granted access to their employer's email system (not seeking access) may be prohibited from using the system for communicating *any* type of Section 7 message to each other—necessarily including an organizational message. Promoting self-organization, of course, is a core purpose of the Act (as the text of Section 7 shows[52]), and as the Supreme Court has observed the right of employees to self-organize "necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite."[53] This is not a case where non-employees, such as union organizers, who are strangers to the employer's property seek to exercise *derivative* Section 7 rights to reach employees.[54] The Board must recognize the "distinction between rules of law applicable to employees and those applicable to nonemployees," [55] and must "distinguish between the organizing activities of employees and nonemployees,"[56] or run afoul of the Supreme Court.

2.

By contrast, the employer's property right (such as it is) is a relatively weak one. The Board is not dealing here with a property owner's right to exclude unwanted persons from his real property (as was the case in *Babcock & Wilcox*, for example), but with his right to control the use of his *personal* property (the e-mail system) by persons who have already been granted access to it (employees). As the *Purple Communications* Board correctly pointed out, an employer's e-mail system is personal property, not real property, and thus (under well-established common-law principles) the employer's property right in the system is not prejudiced unless actual harm to the system itself is proven.[57] The majority does not address this point successfully; [58] rather, it finds

means of communication for employees rightfully on employer property is immaterial. See *Magnavox*, supra, 415 U.S. at 325–327; *Beth Israel Hospital*, supra, 437 U.S. at 505. Indeed, the majority properly acknowledges that a Sixth Circuit panel subsequently questioned the correctness of the court's *Windemuller* decision. See *Meijer, Inc. v. NLRB*, 130 F.3d 1209, 1215 (6th Cir. 1997).

[49] 424 U.S. at 522.

[50] Id.

[51] *Motor Vehicle Mfrs. Assn. v. State Farm Auto Mutual Insurance Co.*, 463 U.S. 29, 43 (1983).

[52] Sec. 7 provides that "[e]mployees shall have the right to self-organization." 29 U.S.C. §157.

[53] *Beth Israel Hospital*, supra, 437 U.S. at 491.

[54] The contrast between this case and cases involving nonemployee union organizers like *Babcock & Wilcox* and *Lechmere*, supra, which reaffirmed *Babcock & Wilcox*, is obvious. See *Beth Israel Hospital*, supra, 437 U.S. at 504–505 (distinguishing *Babcock & Wilcox* in case involving workplace solicitation by employees). "By its plain terms," the Act "confers rights only on *employees*, not on unions or their nonemployee organizers." *Lechmere*, supra, 502 U.S. at 532 (emphasis in original).

[55] *Babcock & Wilcox,* supra, 351 U.S. at 113.

[56] *Lechmere*, supra, 502 U.S. at 537.

[57] 361 NLRB at 1059–1060. See, e.g., *Intel Corp. v. Hamidi*, 30 Cal. 4th 1342, 1351 (2003) (addressing common-law claim of trespass to chattels with respect to employers' e-mail system). Citing § 218 of the Restatement (Second) of Torts, the California Supreme Court explained that "some actual injury must have occurred in order for a trespass to chattels to be actionable," in contrast to the rule with respect to a trespass to land. 30 Cal. 4th at 1351-1352. Potential harm to an employer's e-mail system, as the *Purple Communications* Board explained, would tend to support an employer's restriction on employees' use of the system, if such harm could be established. 361 NLRB at 1063-1064. In this respect, *Purple Communications* reflects a better understanding and acknowledgement of common-law property doctrine than does today's decision.

[58] The majority makes two unpersuasive arguments. First, my colleagues argue that, if my view is "taken at face value . . . an employer could not assert *property rights* to forbid an employee", on nonworking time, from using its photocopier to make "thousands" of union flyers, its delivery truck to drop off flyers, or its hydraulic lift to service trucks to shuttle employees to a union protest. But my colleagues acknowledge that a prohibition demonstrably necessary to maintain production or discipline would be perfectly permissible. Such a showing would be simple, because in each instance, the interference with production and discipline is inherent in the use to which the employer's equipment is being put. In all of these examples using the employer's equipment necessarily diverts its use from the employer's purposes and consumes (or otherwise diminishes) the employer's limited resources

that employees have adequate alternative means of communication. This is a non sequitur. Inasmuch as the majority's holding rests entirely on the overriding value it places on the employer's property interest in its e-mail system, the majority necessarily must explain what that interest is and how it would be harmed by permitting employees to use the system for Section 7 communications on nonwork time. The majority's failure to offer any reasonable explanation is enough, by itself, to require reversal of its decision.

3.

Impermissibly under-weighting employees' Section 7 rights while impermissibly over-weighting employers' property rights, the majority derives a purported accommodation of the respective rights that allows employers to prohibit employees with access from using the email system to engage in any type of Section 7 communication, unless (absent discrimination) they lack alternative means of communication. As explained, however, Supreme Court and Board precedent establish that when the Section 7 rights of *employees* is at issue, alternative means of communication are immaterial.[59] But even putting this principle aside, the majority's view of what alternative means are sufficient to defeat employees' Section 7 rights is irrational.

To ensure that it effectively protects rights guaranteed by the Act, the Board must assume (1) that employees want to use the employer's email system to engage in self-organization, and (2) that they want to organize a collective-bargaining unit that encompasses *all* statutory employees of the employer—not just some subset of employees with whom they might have regular, face-to-face contact.[60] Section 9 of the Act, which creates a process for achieving union representation in the workplace, guarantees employees the "fullest freedom in exercising [Section 7] rights" and it specifically provides that an "employer unit" may be appropriate for bargaining, in addition to a "craft unit, plant unit, or subdivision thereof."[61] An employer-wide unit may encompass thousands of employees: notably, the employer here had a workforce of about 3000 employees. We should assume a case where employees with access to the employer's e-mail system will wish to communicate with every other statutory employee of the employer who also has such access.

In that context, it should be clear that e-mail communication is sui generis: there is virtually no alternative means of communication that is even a rough equivalent in terms of ease of use and comprehensive reach. To reach a coworker by e-mail, an employee likely needs only to know her name. The employees need not work at the same time, in the same place, and they need never meet in order to communicate. No form of hypothetical face-to-face communication is comparable.[62]

In contrast to e-mail, face-to-face communication—to occur even *once*—–requires that employees be present at the same time, in the same place. This will not hold true for employees (1) who work different hours, perhaps on entirely separate shifts or on schedules that never overlap; and/or (2) who work in different places (even if in the same facility) where they do not ordinarily come in contact with each other, particularly in nonworking areas (the only places where, under current law, employers must permit the distribution of literature). Indeed, even for employees who work at the same time and in the same place (if not side-by-side), there may be no non-

(whether copier paper, gas for a truck, or the life of the lift)—unlike the use of the employer's email system, which my colleagues concede is "virtual." In other words, *Purple Communications* does not create a free-for-all scenario but requires a balancing of the employer's managerial interests and employees' right to engage in Sec. 7 communications at the workplace.

Second, my colleagues fail to acknowledge the significance of the fact that under the common law of property, an interference with real property (e.g., the sort of trespass involved in cases like *Babcock & Wilcox*) is treated differently than an interference with personal property (e.g., the use of an employer's email system for Sec. 7 purposes). Instead, my colleagues insist that all that matters is whether the use of the personal property is "rightful." In turn, the majority misattributes to me the view that "an individual's use of personal property is *rightful* simply because it is not *actionable* at common law." My position, rather, is that application of the *Republic Aviation* "special circumstances" test here is broadly consistent with property law principles, inasmuch as it requires the equivalent of a showing of harm to the employer's interests before use of the email system for Sec. 7 purposes—by employees already granted access to the system— may be prohibited. Under the majority's new rule, employers need never show that employees' use of an email system for Sec. 7 purposes threatened any harm at all to the system or to the employer's interest in maintaining production and discipline.

[59] See, e.g., *Beth Israel Hospital*, supra, 437 U.S. at 505 ("[T]he availability of alternative means of communication is not, with respect to employee organizational activity, a necessary inquiry."). See supra, fn. 41.

[60] Indeed, the majority's recent decisions reflect a clear desire to *require* employees to seek the largest possible bargaining units. See, e.g., *Boeing Co.*, 368 NLRB No. 67, slip op. at 7 (2019) (dissent). In *Boeing*, I explained that the majority's approach – building on its reversal of precedent in *PCC Structurals*, 365 NLRB No. 160 (2017) – effectively required employees to seek a 2700-person bargaining unit encompassing every production-and-maintenance employee at the facility there.

[61] 29 U.S.C. §159(b).

[62] The majority points to cases in which employees have succeeded in organizing multisite bargaining units, despite the absence of access to employer email systems. But that employees can sometimes overcome obstacles to organizing—whether practical or legal—hardly demonstrates that a particular obstacle is insignificant or that its endorsement by the Board is actually justified as a matter of law or policy.

working-time, nonworking-place setting where they ordinarily would meet. There may be no break room and no employee cafeteria at all—or, in any case, no setting large enough to accommodate more than a fraction of the desired employer-wide bargaining unit. No such limitations apply to an e-mail system. And even if an employee has some face-to-face contact with some co-workers at some times, that contact may encompass only a small fraction of the potential unit. These are the undeniable realities of the modern workplace.

By contrast, the majority's invocation of a hypothetically "typical workplace," and its idealized description of alternative means of communication, has no empirical basis and simply ignores the realities of many American workplaces where employees do not have routine face-to-face contact with many (perhaps most) of their coworkers and have no idea how to contact them, even if they have access to smartphones, personal e-mail, or social media. Thus, there is no basis for the majority's assertion that "[i]n the typical workplace, … oral solicitation and face-to-face literature distribution provide more than 'adequate avenues of communication.'" And even if, as the majority says, "in modern workplaces employees also have access to smartphones, personal email accounts, and social media," the majority utterly fails to explain how an employee may use her personal communication device to reach a coworker whose phone number or e-mail address she does not know and with whom she has no contact with at work—but who would be a member of an appropriate employer-wide bargaining unit. In the end, it should be clear that what the majority means by "adequate avenues of communication" is *any* avenues of communication, no matter how limited or ineffective. This view does not accommodate employees' Section 7 rights with employer property rights, it eclipses them.

IV.

Purple Communications, overruled today, had a strong foundation in Supreme Court precedent and in Board precedent. Today's decision, in contrast, reflects a result in search of a rationale. In place of a carefully-considered test for determining under what conditions employees may use an employer's email system for purposes protected by the National Labor Relations Act—*if* they have been granted access to the system—the majority invokes employers' supposed property rights in order to create obstacles to employees' ability to communicate with each other at work—the "place uniquely appropriate for dissemination of views" about union representation and working conditions.[63] These obstacles have no basis in the Supreme Court's decisions interpreting the Act, and they frustrate the Act's core purpose of promoting self-organization. There is now a long and growing list of decisions by the majority whittling down statutory protections for American workers who hope to organize a union or to improve their work lives. Like the others, the decision here is not simply bad policy, it is arbitrary—inconsistent with the requirements of reasoned decisionmaking. Accordingly, I dissent.

Dated, Washington, D.C. December 16, 2019

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

[63] *Magnavox*, supra, 415 U.S. at 325.